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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1903.

No. 243.

LYDIA BRADLEY,
Plaintiff in Error,
vs.
H. W. LIGHTCAP,
Defendant in Error.

} Error to Supreme Court of Illinois.

THE PLEADINGS.

This is a consolidation of five ejectment suits brought by defendant in error against plaintiff in error's tenants July 13, 1895, in the Circuit Court of Mason County, taken by change of venue to Fulton County for trial. The judgment in the Circuit Court of Fulton County was in favor of plaintiff in error. (Print. Trans., 47-48.)

At the October Term, 1898, however, the Supreme Court reversed this judgment.

Upon petition for rehearing the case was reargued and at the October Term, 1898, the Supreme Court adhered to its opinion.

Subsequently a second rehearing was permitted by that court, and after the third hearing the court still adhered to its first opinion and the judgment was reversed, and the cause remanded to the Circuit Court. (Print. Trans., 49; 186 Ill. R., 510.)

Thereupon said ejectment case came on for trial at the September Term, 1902, of the Circuit Court of Fulton County in accordance with the views expressed by the Supreme Court of Illinois, and judgment was recovered against plaintiff in error. (Trans., p. 61; Rec., p. 70.)

Plaintiff in error then appealed to the Supreme Court of Illinois, where the judgment of the lower court was affirmed February 18, 1903, by a majority of the justices. (Print. Trans., 259, 266, 269; 201 Ill. R., 511, 524, 528, 534.)

From this decision of the Supreme Court of Illinois writ of error to this court was sued out, and the record is brought here as No. 243.

THE FACTS.

These consolidated cases arise out of the same state of facts, about which there is no controversy. They involve the question of the right of defendant in error, Lightcap, to recover in ejectment 680 acres of land hereinafter mentioned, which is in the possession of plaintiff in error, and (involved therein) the question of the constitutionality of a statute of Illinois of 1872, passed after the execution of the mortgage deed under which plaintiff in error claims, as said statute is construed and applied by the Supreme Court of Illinois herein, to deprive plaintiff in error of her estate and possession.

June 3, 1867, Tobias S. Bradley loaned T. B. Breedlove $19,616, and to secure the same took a mortgage upon 1,200 acres of land in Mason County, Illinois. (Trans., p. 180.)

Upon the death of Tobias S. Bradley, Lydia Bradley, his widow, became the sole owner of the Breedlove mortgage and notes.

October 8, 1867, T. B. Breedlove conveyed said 1,200 acres to Benjamin S. Prettyman of Pekin, Illinois, subject to said mortgage to Bradley. (Trans., p. 86.)

August 13, 1868, Benjamin S. Prettyman conveyed a part of said lands, 680 acres, the premises now in controversy, to Absalom McCune, retaining the remainder, 520 acres, in his own name. (Trans., p. 89.)

At the same time he procured from said McCune a mortgage trust deed running to E. G. Johnson, trustee, securing the payment of $15,000 upon said 680 acres of

land, evidenced by three notes drawn to the order of Lydia Bradley, and due in one, two and three years after date respectively. (Trans., p. 95.) This form of mortgage—a deed of trust in the nature of a mortgage to a third person as trustee—is a common form in Illinois.

The said trustee, E. G. Johnson, was then Mrs. Bradley's attorney in Peoria, Illinois.

Taking these notes and the trust deed to Washington Cockle, then agent for Mrs. Bradley, Mr. Prettyman persuaded her through said agent, to accept them as part payment of the Breedlove notes, paid the difference and secured a release of the 1,200 acres. (Trans., p. 126; Rec., p. 174; Trans., p. 218; Rec., p. 315.)

November 13, 1868, Mr. Prettyman secured a conveyance of the 680 acres from McCune, subject to said trust deed to Johnson. (Trans., p. 243, p. 91.)

Absalom McCune then disappeared from the state and has never since been found. (Trans., p. 198; Rec., p. 289.)

No taxes were ever paid by the mortgagor, McCune, or his grantee, Prettyman (Print. Trans., 203-211), and no part of the principal or interest of the mortgage debt was ever paid, but every covenant of the mortgage deed was broken by them.

About July 1, 1870, she appointed Austin Johnson her business agent. (Print. Trans., 197.)

In 1871 plaintiff in error discovered that McCune had gone, that no taxes had been paid since 1867, that the land was all swamp, unimproved and unoccupied and worth only $1 to $10 per acre, and that all the valuable land in the original Breedlove mortgage had been secured by said Prettyman free and clear of encumbrance.

(Trans., p. 147; Rec., p. 207.) Mrs. Bradley thereupon, on May 24, 1871, redeemed from the tax sales for taxes of 1868 and 1869; and again in 1872 for the taxes of 1871 (Print. Trans., 201, 203-211, 221), and she herself has paid all other taxes on the land assessed since the mortgage was made. (Print. Trans., 221.)

In 1871, in the first part of the summer, Austin Johnson in her behalf went upon the land which was lying vacant and open. (Print. Trans., 198, 212.)

In the summer of 1872 Mrs. Bradley and Austin Johnson together went upon the land and she took personal and exclusive possession of it, which by herself and her tenants she has retained ever since. (Print. Trans., Ev. of Johnson, 199, 200, 201; Ev. of Mrs. Bradley, *id.*, 218, 219, 222-3.)

At the March Term, 1872, of the Circuit Court of Mason County she filed a bill to set aside said transaction with Prettyman for fraud, and to subject the whole 1,200 acres to the payment of the balance of the debt. (Trans., p. 99.)

This bill was contested until August 22, 1879, when the court denied the prayer of the bill to set aside the release of the 520 acres of good land, and entered decree of foreclosure and sale upon the 680 acres of swamp land only. (Trans., p. 137.)

The amount found due plaintiff in error was $31,500.

The 680 acres were sold by the Master in Chancery October 27, 1879, and bid in for plaintiff in error for $10,000. (Trans., p. 141.)

The history of the case ends here. No evidence was offered to show whether or not a deed had been issued upon said certificate. Although the possession of plaintiff in error was *prima facie* evidence of title, and the rule

is that the possessor will be deemed the true owner until the contrary appears, in this case the state court has, as we conceive, erroneously reversed this presumption.

Plaintiff in error had, however, in 1871 found the land abandoned (Trans., p. 198) and sold for taxes; had redeemed the same (Trans., p. 203), and fenced and thence thereafter occupied and used the 680 acres of land for hay and pasture as much as the nature of the land would permit. After the foreclosure she proceeded to develop and improve the land. A drainage district was organized and large ditches dug, thoroughly draining the whole swamp. Three sets of farm buildings were erected, fences were built, tiles were laid, the land broken and reduced to cultivation (Trans., pp. 221 and 222), and she has continued in possession by her tenants until July 13, 1895, when said suits in ejectment were filed, and thence until this time. These suits were brought by defendant in error, to whom Mr. Prettyman had conveyed by quitclaim September 4, 1893, the deed being recorded November 30, 1894. (Trans., p. 94.)

Although these suits were brought in Mason County, where the land is situated, the cases were taken to Fulton County upon a change of venue. (Trans., p. 31.)

At the time of the execution of the mortgage deed in question, under which plaintiff in error claims, the statutes of Illinois provided:

> "§ 24. In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity, for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantors, grantees to redeem the same in the manner prescribed in this chapter, for the redemption of lands sold by virtue of execution issued upon judgments at common law, and judgment creditors may redeem lands sold under

any such decree in the same manner as is prescribed for the redemption of lands, in like manner, sold upon executions issued upon judgments at common law." (Rev. Stat., 1845, Chap. 57, Sec. 24, p. 305; Gross Statutes, p. 382.)

This act was passed in 1841, and is the same act which was before this court in *Bronson* v. *Kinzie,* 1 How., 311. The section of the statute allowing redemption from execution sales, which is thus extended to foreclosure sales under mortgages, is set forth under the second division of the "questions involved," a little later in this brief (*post,* p. 15).

The statute relating to sales upon execution, in force when the mortgage was made, further provided:

"§ 12. Whenever any land or tenements shall be sold by virtue of any execution, it shall be the duty of the sheriff or other officer, instead of executing the deed for the premises sold, to give to the purchaser or purchasers of such lands or tenements a certificate in writing describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the plaintiff in the execution, the amount of his bid, and the time when the purchaser will be entitled to a deed for such lands or tenements, unless the same shall be redeemed as is provided in this chapter; and said sheriff or other officer shall, within ten days from such sale, file in the office of the recorder of the county, a duplicate of such certificate, signed by him; and said certificate, or a certified copy thereof, shall be taken and deemed evidence of the facts therein contained." (Rev. Stat. Ill., 1845, Chap. 57, Sec. 12, p. 302; Gross Statutes, 1869, p. 380.)

"§ 22. If such lands or tenements so sold shall not be redeemed, as aforesaid, either by the defendant or by such creditor, as aforesaid, within fifteen months from the time of such sale, it shall be the duty of the sheriff or other officer who sold the same, or his successor in office, or his executors or

administrators, to complete such sale, by executing a deed to the purchaser." (Rev. Stat., 1845, Chap. 57, Sec. 22, p. 304; Gross Statutes, 1869, p. 381.)

The statutes of Illinois (prior to the act of 1872, which is in question in this case and is referred to shortly hereafter), contained no limitation upon the time within which a sheriff's or master's deed must be taken, after the period for redemption had expired, and prescribed no penalty or loss of right to the purchaser by reason of delay or failure in taking out such deed.

In *Rucker* v. *Dooley*, 49 Ill., 377 (which was decided at the September Term, 1868, a few weeks after the mortgage deed here in question was dated), the Supreme Court of Illinois, in an equity case, decided, as against a purchaser of real estate at an execution sale upon a judgment, who was never in possession of the land, and who had no claim to the land, except under his judgment and execution sale, and who had taken out a sheriff's deed twenty-nine years after the sale, and in favor of a *bona fide* purchaser in possession claiming by mesne conveyances from the judgment debtor, as follows:

1. That for the protection of purchasers for a valuable consideration without notice of any lien, from the judgment debtor and those claiming under him, a sheriff's deed should not be executed to the holder of a certificate of purchase, who is not under legal disabilities, on the application of the holder to a sheriff, nor by any rule or order of court upon him for any such purpose, after the lapse of twenty years. That such lapse of time shall be considered an insuperable bar to its execution. This ruling appears to have been by analogy to the limitation upon an action for the recovery of lands.

2. That if the application for a deed be made after the lapse of eight years and three months (which was the period of seven years during which a judgment is a lien upon land, plus fifteen months, the longest period allowed for redemption by a judgment debtor or his creditors after a sale upon execution), and within twenty years, the same must be made through the proper court, by a rule upon the sheriff to show cause, and on notice to parties interested, when the record should show the existence of intermediate purchasers from the judgment debtor, or shall otherwise appear, of the particular lot or tract of land described in the certificate. This appears to have been by analogy to certain other limitations such as that fixed for the lien of a judgment. (49 Illinois Reports, 380-84.)

The above limitations, which were laid down by a court of equity as called for *ex acquo et bono,* had no application to a case like this at bar, where a mortgagee became the purchaser at a foreclosure sale, and was, from and after the expiration of the period of redemption, in actual possession and occupation of the premises, claiming title adversely to all the world. And, under the law of Illinois, in force when the mortgage in question was made, plaintiff in error—having entered into actual possession and occupation of the mortgaged premises after condition broken, but before the foreclosure decree and sale, and remained continuously in possession for many years (more than twenty), before the ejectment suits here were brought, and having paid all taxes,—had the estate and right of possession, and could not be deprived thereof or disturbed therein at the suit of the mortgagor or his grantee, even if she had never taken out a master's deed.

The decision of the Supreme Court of Illinois in the case at bar, holds, *in a suit at law in ejectment* by the grantee of the mortgagor, that under and by force of the statute of that state, enacted in 1872, nearly four years after this mortgage was made, and which provided that if the holder of a certificate of purchase under a sheriff's or master's sale should not take the deed within five years of the expiration of the time of redemption, "the certificate of purchase shall be null and void," the plaintiff in error, failing to show that she had taken out such master's deed within such period, ceased to have any interest whatever in the premises or any right to the possession; and that although she had entered into and held possession and paid taxes, as aforesaid, the mortgagor, or his grantee, was entitled to judgment against her in ejectment, and to oust her therefrom without payment of the mortgage debt or any part thereof.

THE QUESTIONS INVOLVED.

I.

The constitutionality of Section 30 of the act of the General Assembly of Illinois, entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," approved March 22, 1872; in force July 1, 1872,—being Chapter 77, Rev. Stat., Illinois, as the same is construed and applied by the Supreme Court of Illinois in this case, is questioned.

After providing with respect to the matters specifically mentioned in the title of the act and for the issue of a certificate of purchase by the officer making the sale to the purchaser (such provisions being not materially different from the previous statutes herein quoted), the statute provides in Section 30 as follows:

> "When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor *at any time within five years from the expiration of the time of redemption.* The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. *If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer*

whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed."

(The part italicized was first enacted in this act of 1872.)

The construction put upon this statute by the Supreme Court of Illinois in this *suit at law* is briefly this:

Admitting that the trust deed conveyed the title to Johnson as trustee for plaintiff in error, and that after condition broken, under the law existing at the date of the mortgage, the title to said lands was absolute in plaintiff in error as against the mortgagor and his grantees, nevertheless, when the sale was made under the decree and the mortgagee purchased at the sale (and so received no money upon her mortgage debt), the mortgage lien was satisfied as to the land, and all rights of the purchaser were represented by the certificate of purchase, which was a statutory lien upon the land for the payment of the amount bid at the sale and necessary to redeem, or (in default of that redemption) a right to a deed. But the decision in effect further was that by force of said statute of 1872, the mortgagee's legal title was cut down so that if the purchaser failed to take the deed within the time limited by the said statute, her certificate of purchase, by force of the statute, became null and void, and the legal title of the mortgagee terminated as it would upon redemption, and the mortgagee, or she, as purchaser, had no interest whatever in the premises; and that the legal title was then in the mortgagor, or his grantees, and without any payment by him of the mortgage debt, was now freed from the mortgage, and

he was the owner in fee of the land discharged of the mortgage debt, and entitled to recover the possession from her at law in ejectment on the strength of his perfect title.

See opinion in *Lightcap* v. *Bradley*, 186 Ill., 510 (518), as well as opinion in the record in this case (pp. 262, 263).

In effect the decision is that the legal title, which was in Johnson the grantee, in the mortgage deed and became absolute in him, as trustee for plaintiff in error, on condition broken in 1869, was made to divest and became revested in the mortgagor by force of said statute upon a new condition or event prescribed by said statute; and that by such statute the mortgagor's previous right, which was to redeem upon payment, is enlarged into the legal title discharged of all claim under the mortgage or purchase upon such new event and without any redemption or payment.

Said statute as thus construed and applied violates two provisions of the Constitution of the United States, viz.:

> Art. 1, Sec. 10: "No state shall * * * pass any * * * law impairing the obligation of contracts."
>
> Sec. 1, Amendment 14: * * * "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

Said statute, as construed and applied in this case, impairs the obligation of the mortgage contract of McCune to Johnson, trustee for plaintiff in error, in this: That said mortgage was executed and delivered August 3, 1868; the condition was broken the following year by failure to pay taxes, and by failure to pay the mortgage note then due, and again in 1870 and 1871 by fail-

ure to pay the notes then maturing, whereby the title had become at law absolute in plaintiff in error as against the mortgagor and his grantees, prior to the enactment of said statute of March 22, 1872. Such absolute title at law could only be defeated by actual payment, made in order to redeem the premises under the equitable right to redeem. The suit in equity and decree therein for foreclosure and sale did not destroy or affect that legal title until such title should pass by master's deed to the purchaser at that sale. But by this act of 1872, as thus construed and applied, this contract right has been impaired; and by its application to eject her from the possession of her property, she is deprived of her property without due process of law.

Again, by the foreclosure decree and sale, October 27, 1879, the equity of redemption remaining in the mortgagor was limited to twelve months, and upon his failure to make redemption his right to redeem was foreclosed and barred. This was one of the obligations of the mortgage contract at its date, and was the express provision of the decree. (Pr. Trans., pp. 139-140.)

This obligation of the mortgage contract has been impaired by said statute of 1872, as so construed and applied, so that the mortgagor's title was not fully divested by such foreclosure, but remained in him subject only to the right of the plaintiff in error to take a deed from the master in chancery, and upon her failure to take such deed within the time prescribed, her title failed, and that of the mortgagor remained. And her right and title having been executed and made effectual by possession, is, by such statute, as so applied to oust her therefrom by the writ of ejectment without any compensation, deprived of her property without due process of law.

II.

Said statute of 1872, as construed and applied, impairs the obligations of said mortgage contract in this, to wit: Sec. 13, Ch. 57, R. S. Ill., 1845, in force at the date of the mortgage contract, provided:

> "It shall be lawful for any defendant, his heirs, executors, administrators or grantees, whose lands or tenements shall be sold by virtue of any execution, within twelve months from such sale, to redeem such lands or tenements, by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff or other officer who sold the same, for the benefit of such purchaser, the sum of money which may have been paid on the purchase thereof, or the amount given or bid, if purchased by the plaintiff in the execution, together with interest thereon at the rate of 10 per centum from the time of such sale, and on such sum being made as aforesaid, the said sale and the certificate thereupon granted shall be null and void."

And by Section 24 of said statutes which is hereinbefore set forth, it was made lawful for the mortgagor or his grantees to redeem in the manner prescribed for the redemption of lands sold by virtue of executions upon judgments.

And by the decisions of the courts of last resort of said state, it had become the established construction of said statute, and a rule of property, at the date of said mortgage contract, that if the mortgagor failed to redeem in accordance with said statute, thereafter he had no further right, title or interest in the premises sold; and said statutory enactments and judicial decisions became a part of the obligation of said mortgage contract; yet the said statute of 1872, as construed and applied by the Supreme Court of Illinois in this case, impairs said obligation of

the mortgage contract, in that not only is the certificate of purchase declared void, but all rights of the holder thereof and of the mortgagee are destroyed and declared ended, without any payment to her of the mortgage debt, while the mortgagor and his grantee, without making any payment of the mortgage debt, are held and considered to have regained the legal title to the mortgaged premises after foreclosure and sale and expiration of the period of redemption, free and discharged of the mortgage debt, which is contrary to said Section 10 of Article 1 of the Federal Constitution.

III.

Said decision of the Supreme Court of Illinois in this case deprives plaintiff in error of her title to the premises in controversy without due process of law, in this, to wit:

That upon condition broken, the title conveyed by the mortgage became at law absolute in her, or in E. G. Johnson, the grantee, as trustee for her; and after rightfully reducing such mortgaged property to possession, she could not be deprived thereof except upon payment.

By the law of Illinois, at the time when this mortgage was made, and thence until the decision of the Supreme Court of Illinois herein, that legal title in the mortgagee was not determined or affected by the foreclosure sale in equity, but remained in the mortgagee until it should either be determined and revert to the mortgagor by his redemption according to law, or be conveyed by the master's deed to the purchaser. It was, from and after such sale, in the mortgagee in trust—for the mortgagor if he should redeem, or, in default of redemption, for the purchaser.

By the foreclosure of the mortgagor's title and purchase by plaintiff in error, and by the failure of the mortgagor to redeem, his right to redeem was barred, and plaintiff in error became entitled to take a deed from the master in chancery, and thereby her equitable title was complete and added to the legal title already in her, or held in trust for her by the grantee in the trust deed; and being in possession she had an indefeasible title as against the mortgagor and all the persons claiming under him, according to the fixed rules of law in said State of Illinois at the date of said mortgage and of the breach of condition and acquiring possession thereunder, and at the date of her purchase and the expiration of the time for redemption. But the Supreme Court of Illinois in and by its said decision has departed from the former holdings of said court and the law of the land, and has established a new rule, as the construction and effect of said statute of 1872, by which it is held that no title was absolutely vested in plaintiff in error by said mortgage, breach of condition thereof, possession and proceedings, and the mortgagor's title was not completely divested by such foreclosure and failure to redeem;—and that thereby plaintiff in error is deprived of her property without due process of law, contrary to Section 1 of the 14th Amendment of the Constitution of the United States.

IV.

The title and possession (by her tenants) of plaintiff in error of the premises in question, at and before the commencement of this suit, were complete and a defense to this action within Section 4 of Chapter 83 of the Revised Statutes of Illinois, which was enacted (in 1835) prior to the execution of said mortgage, and which is as follows:

> "Action brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid; but when the possessor shall acquire such title after taking such possession the limitation shall begin to run from the time of acquiring title."

The title relied upon (if she did not have the legal title) is the equitable title derived as set forth in the foregoing division III, and this is deducible of record from the United States, if defendant in error has proved his title, since Prettyman, his grantor, acquired title from her mortgagor, subject to the mortgage under which plaintiff in error secured her equitable title. Upon the expiration of the mortgagor's period of redemption, plaintiff in error was entitled to the master's deed, and to the legal title thereby conveyed, if she did not already then have the legal title. That was a perfect equitable title, or "title in equity" within the above statute.

It is admitted she has paid all taxes since 1871 and has been in actual possession by her tenants since 1872.

Yet by a construction and application of the said act of 1872, which was first given thereto by the decision of the Supreme Court of Illinois in this case after her right and defense under the above statute had become complete, she is deprived thereof and of her property without any compensation and without due process of law.

BRIEF.

I.

The law of the land, as recognized and enforced by the courts, providing means of enforcement of contracts, becomes a part of the contract the same as though included in its terms; and a change in such law, after a contract has been made or title vested thereunder by which change the obligation of such contract is impaired or such title is divested, is a law impairing the obligation of contracts, and if accomplished by a statute of a state is obnoxious to Section 10, Article 1 of the Constitution of the United States.

Tennessee v. *Sneed*, 96 U. S., 69.
Edwards v. *Kearzey*, 96 U. S., 595.
Louisiana v. *New Orleans*, 102 U. S., 203.
Walker v. *Whitehead*, 16 Wall., 314.
Field v. *Brokaw*, 148 Ill., 654.
Barnitz v. *Beverly*, 163 U. S., 118.
Seibert v. *Lewis*, 122 U. S., 284.
Bronson v. *Kinzie*, 1 How., 311 (319).
Gunn v. *Barry*, 15 Wall., 610.
Shapleigh v. *San Angelo*, 167 U.S., 646 (657).
Ogden v. *Saunders*, 12 Wheat., 213 (257).
McCracken v. *Hayward*, 2 How., 608 (717).

II.

The English law of mortgages was adopted in Illinois. A mortgage is a conditional conveyance of the fee. The legal title passes to the mortgagee. After condition broken, the title at law becomes absolute in the mortgagee, who may recover possession as against the mortgagor. The mortgagee is held, in law, the owner of the fee, having the *jus in rem* as well as the *jus ad rem*. (See cases cited below.) This ejectment suit was one at law, and it did not matter that the rule was different in a court of equity, as the court at law could not consider that rule.

Esker v. *Heffernan*, 159 Ill., 38-43.

After condition broken the mortgagor has only an equity of redemption. By the redemption statute in force when this mortgage was given, that equitable estate or right was continued for twelve months after a foreclosure.

Bronson v. *Kinzie*, 1 How., 311, 322.

Such was the law of the state as promulgated by the courts of last resort at and before the date of the mortgage contract in question in this case.

Bronson v. *Kinzie*, 1 How., 311 (318).
Carroll v. *Ballance*, 26 Ill., 9 (16, 17).
Chickering v. *Failes*, 26 Ill., 507 (519).
Nelson v. *Pinegar*, 30 Ill., 473 (481).
Griffin v. *M. Co.*, 52 Ill., 130 (145).
Kenyon v. *Shreck*, 52 Ill., 382 (386).
Kelgour v. *Wood*, 64 Ill., 345 (347, 348).
Williams v. *Brunton*, 3 Gilm., 600 (621, 622).
Longwith v. *Butler*, 3 Gilm., 32 (36).
Kruse v. *Scripps*, 11 Ill., 98 (104).

The right of the mortgagor, or his grantees, to redeem after condition broken is a purely equitable right—the creation of courts of chancery; and can only be asserted in a court of equity. It could not be recognized in a court of law in an ejectment suit, as is done in the case at bar.

Kenyon v. *Shreck*, 52 Ill., 382 (386).
Bracken v. *Cooper*, 80 Ill., 221 (231).
Mulvey v. *Gibbons*, 87 Ill., 367 (383).

His right of redemption after sale and under the statute was only upon the absolute condition of making full payment, within a prescribed time, of the bid, interest and costs.

And so the law of Illinois remained after said date, and still remains and is enforced in cases where said statute of 1872 does not apply to change it.

Kelgour v. *Wood*, 64 Ill., 345 (348).
Vallette v. *Bennett*, 69 Ill., 632 (635).
Harper v. *Ely*, 70 Ill., 581 (585).
Oldham v. *Pfleger*, 84 Ill., 102 (103-4).
Davis v. *Conn. Mut. L. I. Co.*, 84 Ill., 508 (510).
Mulvey v. *Gibbons*, 87 Ill., 367 (382).
Fitch v. *Wetherbee*, 110 Ill., 475 (487).
Smith v. *Mace*, 137 Ill., 68 (74).
Esker v. *Heffernan*, 159 Ill., 38 (40).
Walker v. *Warner*, 179 Ill., 16 (23).
Ware v. *Schintz*, 190 Ill., 189 (193).
Farrar v. *Payne*, 73 Ill., 83 (88).
Stone v. *Tyler*, 173 Ill., 147 (155).

The legal title here passed to Johnson, the grantee in the trust deed, and became absolute in him as trustee for plaintiff in error, on condition broken, which occurred as

early as 1869. That legal title in Johnson, trustee, was not divested and revested in the mortgagor, or affected, by the foreclosure decree in equity and sale thereunder, unless such effect of divesting a title is given to the statute of 1872 here in question.

III.

By the law of Illinois, as promulgated and enforced by the courts of last resort at and prior to the date of said mortgage contract, if the mortgagor and his grantees failed to redeem the mortgaged premises from foreclosure sale within the time limited by the statute, and the decree of foreclosure, his equity of redemption was barred and foreclosed, and thereafter he had no further right, title or claim in or to the premises.

Burgett v. *Osborne*, 172 Ill., 227 (238).
Bozarth v. *Largent*, 128 Ill., 95 (107).
Smith v. *Mace*, 137 Ill., 68 (73).
Stephens v. *Ill. Mut. Fire Ins. Co.*, 43 Ill., 327 (331).
Jones on Mortgages, Vol. 2, Sec. 1661.
Mulvey v. *Gibbons*, 87 Ill., 367 (382).
Massey v. *Westcott*, 40 Ill., 160 (163).
Herdman v. *Cooper*, 138 Ill., 583 (587).
Lucas v. *Nichols*, 66 Ill., 41 (43).
McLagan v. *Brown*, 11 Ill., 519 (522-3).
Fitch v. *Wetherbee*, 110 Ill., 475 (487).

Defendant in error could only recover in this ejectment suit on the strength of his own title.

Hague v. *Porter* (1867), 45 Ill., 318.
Vallette v. *Bennett* (1873), 69 Ill., 632.
Hammond v. *Shepard*, 186 Ill., 235.

And this must be a legal and not a mere equitable title.

Vallette v. *Bennett, supra.*

But on the other hand, defendant in error could not recover even if he had the legal title, while plaintiff in error rightfully held the possession of the land under a complete equitable title.

Stow v. *Russell,* 36 Ill., 18, at 36.
Staley v. *Murphy,* 47 Ill., 241-5.
Kilgour v. *Gockley,* 83 Ill., 109.
Sands v. *Wacaser,* 149 Ill., 530-4.

IV.

By said law of Illinois as it existed at the date of the mortgage contract, the equity of redemption of said McCune and his grantee Prettyman was barred and determined on the 27th day of October, 1880, at the expiration of twelve months from the date of sale to plaintiff in error (Rev. Stat. Ill., 1845, Sec. 13, Ch. 57, quoted under Point II above), and by the express provisions of the decree of foreclosure the defendants, McCune and Prettyman, and all persons claiming under them since the commencement of the foreclosure suit, February 22, 1872, were forever barred and foreclosed from all equity of redemption and claim of, in and to the said mortgaged premises or any part thereof when the same were not so redeemed by them within the twelve months after October 27, 1879. (Print. Trans., 139.)

But, as construed by the Supreme Court of Illinois in the case at bar, said statute of 1872 has so changed the law that notwithstanding the mortgagor and those claiming under him did not redeem said premises from said

sale according to law, when the certificate of purchase became void, the title to said premises must, in order to give practical effect to said statute, be still in the mortgagor or in the defendant in error claiming under him.

Opinion of the Supreme Court of Illinois (Trans., p. 266; Rec., p. 394).

Lightcap v. *Bradley*, 186 Ill., 510 (532).

For the purpose of determining whether it infringes the constitution, as claimed, said statute must be understood to mean what the courts of last resort of the state have construed it to mean.

Bell v. *Morrison*, 1 Pet., 351.

D'Wolf v. *Rabaud*, 1 Pet., 476.

Van Rensselaer v. *Kearney*, 11 How., 297.

Tioga R. Co. v. *Blossburg & C. R. Co.*, 20 Wall., 137.

Townsend v. *Todd*, 91 U. S., 452.

Scipio v. *Wright*, 101 U. S., 665.

Smith v. *Ames*, 169 U. S., 466.

V.

By the law of Illinois at the time this mortgage was made the fee of the land was conveyed by the mortgagor to the trustee, Johnson, for the use of Mrs. Bradley. The condition of the mortgage was immediately broken, as soon as made, by failure to pay taxes previously and then due, no taxes having ever been paid by the mortgagor, and again by failure to pay the notes maturing in 1869, 1870 and 1871. (Print. Trans., pp. 118, 138, 203.)

After condition broken the title became absolute in the mortgagee, and so it was at the time of the enactment of the statute of 1872.

By the terms of the mortgage, as well as the law of the state, Mrs. Bradley was entitled to take possession of the mortgaged premises and, having taken possession under right and title vested prior to the statute of 1872, and having continued ever since in possession of the property, she cannot now be ousted by the grantee of the mortgagor without any payment of the mortgage debt, as the judgment in ejectment here in effect adjudges, unless said statute of 1872 has divested rights and title acquired prior to its passage.

A statutory bar does not *satisfy* a debt, annul a contract, or deprive the holder of security.

Keener v. *Crull*, 19 Ill., 189 (191).
Newland v. *Marsh*, 19 Ill., 376 (384).
McCagg v. *Heacock*, 42 Ill., 153.
Brockman v. *Sieverling*, 6 Ill., A. 512.
Hancock v. *Franklin Ins. Co.*, 114 Mass., 155.
Moses v. *St. Paul*, 67 Ala., 168.
Wheelan v. *Kinsley*, 26 Ohio St., 131.
Waterman v. *Brown*, 31 Pa. St., 161.
Kemp v. *Westbrook*, 1 Ves., 278.

VI.

If plaintiff in error had a right of entry as against the mortgagor in 1872, when condition was broken and she made her peaceable entry, the statute of 1872, which the Supreme Court of Illinois says is merely a statute of limitation (Trans., p. 265), cannot have destroyed or changed that right of possession without invading the constitution, for laches will not be imputed to one in the peaceable possession of land.

Mills v. *Lockwood*, 42 Ill., 111 (118).
Dorman v. *Dorman*, 187 Ill., 154 (160).

Wilson v. *Byers*, 77 Ill., 76 (84).
Boyd v. *Boyd*, 163 Ill., 611 (615).
Beck Lumber Co. v. *Rupp*, 188 Ill., 562 (570).
Parker v. *Shannon*, 137 Ill., 376 (392).
Bush v. *Stanley*, 122 Ill., 406 (418).

A constitutional statute of limitations does not run against or affect a possessor of real estate, but one out of possession. This was the law of Illinois when this mortgage deed was made.

Mills v. *Lockwood* (1866), 42 Ill., 111 (119).
Parker v. *Shannon* (1891), 137 Ill., 376 (392-3).

By said law of Illinois as it existed at the date of the mortgage contract, the equity of redemption of said McCune and his grantee Prettyman was barred and determined on the 27th day of October, 1880, at the expiration of twelve months from the date of the sale to plaintiff in error. (Rev. Stat. Ill., 1845, Sec. 13, Ch. 57, quoted under Point II above.) And by the express provisions of the decree of foreclosure the defendants, McCune and Prettyman, and all persons claiming under them since the commencement of the foreclosure suit, February 22, 1872, were forever barred and foreclosed from all equity of redemption and claim of, in and to the said mortgaged premises or any part thereof when the same were not so redeemed by them within twelve months after October 27, 1879. (Print. Trans., pp. 138-9.) And by the repeated decisions of the court of last resort of said State of Illinois it had become a fixed rule of property at and prior to the date of said mortgage that the mortgage conveyed the fee, subject to conditional defeasance; that after condition broken the title became ab-

solute in the mortgagee, who was entitled to recover possession of the premises; and that such legal title remained in the mortgagee unaffected by the equitable proceedings and decree of foreclosure and sale until by the master's deed it should pass to the purchaser at such sale. Such subsequent proceedings were in aid, and not in extinguishment, of the original title of the mortgagee.

Williams v. *Brunton,* 3 Gilman, 600 (622-23).
Kruse v. *Scripps,* 11 Ill., 98 (104).
Farrar v. *Payne,* 73 Ill., 82 (88).

The final judgment of the Supreme Court of Illinois in this case at law in ejectment establishes a different rule of law in order to give the statute of 1872 a "practical effect" and prevent its abrogation (186 Ill., 526), to wit: That the legal title of the mortgagee here was not absolute; and that the right of the mortgagor here and his grantee was not a mere equity cognizable or capable of being asserted only in a court of equity, but that the mortgagor, after condition broken, was still as against the mortgagee to be regarded as holding the title; and that his title was not completely divested by the foreclosure and sale and expiration of the period of redemption, but survived, and that the legal title of the mortgaged premises in the mortgagee did not survive the sale, but then ceased, and her only right then was the lien given by the certificate of purchase, and that the mortgagor or his grantee had the legal title, subject to such lien, from and after the sale, instead of a mere equity of redemption; and that all the right, title and interest of plaintiff in error ceased on January 27, 1886, unless she sooner secured a deed from the master in chancery; and that in that event the mortgagee purchaser is not longer entitled to hold possession as against the mortgagor and

his assigns. Such a change in the law, as here applied, deprives plaintiff in error of the right, title and interest vested in her under the laws of the state as they existed at the date of her mortgage and when condition was broken and when she took possession, and violates the prohibition of the 14th Amendment of the Federal Constitution.

Chicago, Burlington & Quincy Railroad Co. v. *City of Chicago,* 166 U. S., 226.
Scott v. *McNeal,* 154 U. S., 34 (45).
Taylor v. *Beckham,* 178 U. S., 548 (599, 605).
Tindal v. *Wesley,* 167 U. S., 204 (222).

VIII.

If the constitutional guaranties referred to protect plaintiff in error from the divestiture of her title, either by the statute of 1872 or by the decision of the Supreme Court of Illinois, she has such an equitable title as is contemplated by the statute of 1835, quoted in our statement of questions involved, and having been in possession, by actual residence thereon by her tenants, since 1872 and paid all the taxes, and for more than seven successive years from and after the expiration of the period of redemption (when her equitable title became complete),—she is protected by said statute from defendant in error's action.

Irving v. *Brownell,* 11 Ill., 402.
Collins v. *Smith,* 18 Ill., 160.
Martin v. *Judd,* 81 Ill., 488.
Dolton v. *Cain,* 14 Wall., 472.
Gregg v. *Tesson,* 66 U. S., 150.
Dredge v. *Forsyth,* 67 U. S., 563.

ERRORS RELIED UPON.

1. That said Supreme Court of Illinois erred in rendering decision in favor of the validity of the Statute of Illinois known as Section 30 of an Act of the General Assembly of Illinois, entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree." Approved March 22, 1872, in force July 1, 1872; also known as Section 30 of Chapter 77 of the Revised Statutes of Illinois, according to the revision of 1874.

And in not holding that said statute was repugnant to the Constitution of the United States and to Section 10 of Article 1 thereof.

And in not holding that said statute was void.

5. That said Supreme Court of Illinois erred in rendering decision and judgment in favor of the validity of the authority exercised under the State of Illinois in said cause, and by virtue of which authority said H. W. Lightcap recovered said judgment against this petitioner and plaintiff in error.

And in not holding that said authority was repugnant to the Constitution of the United States and to Section 1 of Article 14 thereof, also known as Section 1 of the 14th Amendment to the Constitution of the United States.

And in not holding that said authority was void.

7. That said Supreme Court of Illinois erred in not sustaining the claim of this petitioner and plaintiff in error whereby she claimed her title, right, privilege and immunity in and to the properties described in the pleadings and evidence set forth in the record in this cause,

under the constitution and laws of the United States, and under Section 10 of Article 1 and Section 1 of Article 14 of said Constitution, and under Section 1979 of the Revised Statutes of the United States; and her claim that her said title and right are secure under said constitution and laws of the United States and said provisions thereof, from any act or deprivation by authority of said state under said statute thereof, and in not sustaining her claim that under said constitution and laws of the United States and said provisions thereof she has immunity in her said property from said acts and authority exercised under said state.

8. The honorable Supreme Court of Illinois erred in not deciding and holding that there exists in this cause a controversy necessarily involving the construction of the Constitution of the United States and particularly Section 10 of Article 1 thereof, as applicable to the certain statute of Illinois hereinbefore cited, and in not deciding said controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said statute of Illinois void.

9. The honorable Supreme Court of Illinois erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of said section of the Constitution of the United States as applicable to the said statute of the State of Illinois as the same was construed and applied by the trial court, and in not deciding the said controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said Statute of Illinois void.

14. The honorable Supreme Court of Illinois erred in not holding and deciding that there exists in this cause

a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America and said Section 10 of Article 1, and said Section 1 of Article 14 thereof as applicable to the change of judicial construction of the law of mortgage contracts made by the Supreme Court of Illinois and said Circuit Court of Illinois in and for Fulton County, Illinois, subsequent to the date of your petitioner's mortgage contract by which her remedy thereunder was materially impaired.

20. The honorable Supreme Court of Illinois erred in not sustaining the sixth assignment of error laid and alleged therein, to wit: That the court below erred in refusing to hold as the law the propositions submitted by defendant. And as to each of said propositions, that the court erred in not sustaining the same. Said propositions are as follows, to wit:

"I. The court holds that Section 30, Chapter 77, Revised Statutes of Illinois, as construed and applied by the Supreme Court of the State of Illinois, has the effect of depriving the defendant of her property without due process of law, and is therefore in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and Section 14, Article 2 of the Constitution of the State of Illinois.

"II. The court holds that ejectment by a mortgagor or his grantee, claiming the bare legal title, cannot be maintained against a mortgagee in possession, after default, where the latter is in possession of the premises involved, under a certificate of purchase issued to her at sale, even although the time within which the holder of said certificate of purchase could have procured a deed therefor has expired.

"III. That Section 30, Chapter 77, of the Revised Statutes of Illinois, as construed by the Supreme Court of the State of Illinois, is in violation of Section 10 of Article 1 of the Constitution of the United States, and of Section 14, Article 2 of the Constitution of the State of Illinois, because, as applied to contracts in existence prior to its passage, or rights acquired under such contracts prior to its passage, such construction gives it the effect of impairing the validity of a contract obligation.

"IV. That Section 30 of Chapter 77 of the Revised Statutes of the State of Illinois, cannot be constitutionally applied to the rights of the defendant, Lydia Bradley, as mortgagee in the present case, because it was enacted since the said mortgage was given, and is in conflict with Sections 9 and 10 of Article 1 of the Constitution of the United States, and Section 14 of Article 2 of the Constitution of the State of Illinois.

"V. Section 30 of Chapter 77 of the Revised Statutes of Illinois, in so far as it relates to contracts in existence or rights acquired, prior to the time of its passage, is obnoxious to Section 10, Article 1 Constitution of the United States, and Section 14, Article 2, Constitution of the State of Illinois.

"VI. That Section 30 of Chapter 77, of the Revised Statutes of the State of Illinois, as construed and applied by the Supreme Court of the State of Illinois, is in violation of Article 1, Section 10 of the Constitution of the United States.

"VII. That Section 30 of Chapter 77 of the Revised Statutes of the State of Illinois, as construed and applied by the Supreme Court of the State of Illinois, to the facts in the present case, violates Section 1 of the 14th Amendment to the Constitution of the United States.

"VIII. That Section 30 of Chapter 77 of the Revised Statutes of the State of Illinois, as construed and applied by the Supreme Court of the State of Illinois, to the facts in the present case, violates Section 1 of the 14th Amendment to the Constitution of the United States, and also Section 1979 of the Revised Statutes of the United States.

"IX. That if McCune or Prettyman failed to redeem said premises under the statute regulating the right of redemption from the sale of mortgaged premises involved herein, within the time provided by law, then the right, title and interest of the said McCune, Prettyman and his grantee, and each of them, would be cut off, and they, or either of them, could not afterwards, as against the defendant, assert affirmatively, under this section, in this action, any purported title which existed in them prior to the expiration of the time allowed for such redemption, for the purpose of reinvesting themselves, or either of them, with the possession of or title to said premises, because of the failure of the purchaser at said sale, the original mortgagee, the said Lydia Bradley, to take out within five years, a deed for said premises based upon said certificate of purchase.

"X. That said Section 30 of Chapter 77, Revised Statutes of Illinois, should be so construed as to be a statute of repose. That by the elapse of five years from the date of the mortgage sale without the taking out of the deed by the purchaser at said sale, there is no presumption either because of such sale or because of such failure so to take out a deed, that the debt is paid. The original mortgagee who went into possession of said premises for the purpose of protecting herself as such, and who was also the purchaser at said sale, would not, by reason of

such failure so to take out deed within five years, be therefore deprived of the right to possess and occupy said premises until the payment of the mortgage debt.

"XI. A mortgagee in a mortgage or a trustee in a trust deed has the right, upon condition broken, to enter into and take possession of the mortgaged premises and to retain and occupy the same until the payment of the debt.

"XII. The court holds that Section 30, Chapter 77 of the Revised Statutes of the State of Illinois should not be given such construction as to render the certificate of purchase of the defendant, Lydia Bradley, null and void or to create a presumption that the mortgage debt is paid or to divest her title as mortgagee in possession of said premises.

"XIII. That Section 30 of Chapter 77 of the Revised Statutes of the State of Illinois, should not be given such a construction as will have the effect of merging the mortgage debt, first, into the decree; second, into the certificate of purchase, which then represented the debt; and thirdly, of divesting the mortgagee's title as mortgagee in possession or otherwise, when the certificate of purchase becomes null and void, as held by the Supreme Court under the statute.

"XIV. Section 30, Chapter 77 of the Revised Statutes of the State of Illinois should be given such construction in this case that it merely affects the remedy of the said Lydia A. Bradley, defendant herein, and not such rights as she may have under and by the certificate of purchase under said mortgage foreclosure proceedings.

"XV. That the failure of McCune and Prettyman to redeem the premises involved herein from the sale under the decree of foreclosure, within the time provided by

law, completely and perpetually divested the said McCune and Prettyman, and each of them, and all their right, title and interest in and to said premises, and that they could not thereafter, in this action, as against the defendant, Lydia Bradley, as mortgagee in possession of said premises, establish any legal title to said premises, either at common law or under Section 30 of Chapter 77, Revised Statutes of the State of Illinois, for the purpose of reinvesting themselves, or either of them, with the possession of said premises, based upon the equity of redemption which existed in them, or either of them, prior to the expiration of the period limited by law within which they could redeem, solely because of the failure of the defendant as purchaser at said sale, to take out within five years a deed based upon the certificate of purchase issued to her.

"XVI. The court holds that a mortgagee in possession, after sale of the premises under a decree in foreclosure, and the purchase of the same by the said mortgagee, and the issuing to her of a certificate of purchase entitling her to a deed at any time after the expiration of fifteen months from said sale, and within five years from the date thereof, cannot, after the expiration of said five years, at a time when all right to redeem said premises has expired, be dispossessed of said premises in an action of ejectment by the original mortgagor, or his grantee, as holder of the legal title, because the said mortgagee, as the purchaser at said sale, has failed to take out a deed based upon her certificate of purchase within the time limited by the statute; for the reason that, being in possession as against the mortgagor and his grantees, she is entitled to retain such possession until her said mortgage is satisfied.

"XVII. The court holds the law to be that the laws which exist at the time and place of the making of a contract, enter into it and form a part of it. This embraces alike those laws which affect its validity, construction, discharge and enforcement.

"That at the date of the mortgage of McCune to Johnson, August 13, 1862, the laws of this state in regard to the enforcement of mortgage contracts, vested the legal title in the mortgagee upon failure of the mortgagor to comply with the conditions contained in the mortgage, and at law the mortgagee has a right to sue for and recover the possession of the land itself.

"That the act of defendant in taking peaceable possession of the vacant and unoccupied mortgaged premises was not a trespass, but was within her rights under the mortgage as fixed by the laws of this state then in force and effect, and was not more than the courts would have awarded her if she had sought their aid.

"That the possession of defendant was that of mortgagee from that time until she purchased the premises at the master's sale. That no new title was conferred upon her by such purchase, since the certificate of purchase does not purport to convey title, nor did it take away any part of the legal or equitable title theretofore vested in her.

"That after the decree and sale in *Bradley* v. *McCune*, the mortgagor and his assigns, under the laws as then held and announced by the courts of this state, no longer held the legal title, but an equity of redemption as fixed by the decree of foreclosure.

"That upon the expiration of the period of redemption, January 27, 1881, the equity of redemption of mortgagor and his grantees ceased altogether, and thereafter they had no right, title or interest in said premises.

"That defendant thereupon became entitled to a deed from the master in chancery, and being in possession with a right to the title, had a perfect equitable title.

"That the statute of this state relating to taking out deeds upon certificates of purchase, Sec. 30, Ch. 77, Rev. Stat., Ill., was passed after the date of said McCune mortgage and cannot be given an effect which would impair the obligation of the mortgage contract. Only such effect can be given to the statute as comports with the Constitution of the State and the United States. If this statute be given an effect which would terminate defendant's right, title and interest in the premises and deprive her of the right to maintain her possession if she failed to take a deed from the master within five years, such effect would amount to an impairment of contract and be obnoxious to the Constitutions of this State and the United States. The court holds the effect of said statute is merely to cut off the defendant's right to a conveyance from the master, leaving her in possession and with the same legal and equitable title she held before the lapse of the five years.

"The court holds further that if defendant maintained her possession by actual residence of her tenants upon said premises for seven years prior to the commencement of this action, and it appears that her equitable title is deducible of record from the United States, then plaintiff is barred by Sec. 4, Ch. 83, Rev. Stat., Ill., from maintaining this action.

"XVIII. The court holds the law to be that the laws which exist at the time and place of the making of a contract enter into it and form a part of it. This embraces alike those laws which affect its validity, construction, discharge and enforcement.

"That at the date of the mortgage of McCune to Johnson, August 13, 1862, the laws of this state in regard to the enforcement of mortgage contracts vested the legal title in the mortgagee upon the failure of the mortgagor to comply with the conditions contained in the mortgage, and at law the mortgagee had a right to sue for and recover possession of the land itself.

"That the act of the defendant in taking peaceable possession of the vacant and unoccupied mortgaged premises was not a trespass, but was within her rights under the mortgage as fixed by the laws of this state then in force and effect, and was no more than the courts would have awarded her had she sought their aid.

"That the possession of the defendant was that of mortgagee from that time until she purchased the premises at the master's sale. That no new title was conferred upon her by such purchase, since the certificate of purchase does not convey title nor did it take away any part of the legal or equitable title theretofore vested in her.

"That after the decree and sale in *Bradley* v. *McCune*, the mortgagor and his assigns, under the laws as then held and announced by the courts of this state, no longer held the legal title, but an equity of redemption as fixed by the decree of foreclosure.

"That upon the expiration of the period of redemption, January 27, 1881, equity of redemption of mortgagor and his grantees ceased altogether, and thereafter they had no right, title or interest in said premises and cannot recover in this action.

"XIX. The court holds that in this action only the legal title can be considered. That by the trust deed of McCune to E. G. Johnson the legal title was, as between

them, conveyed to Johnson as security for defendant's notes.

"That when default was made in the payment of said notes the legal title in Johnson and the equitable title in defendant, as between them and McCune, or his grantee, became absolute. That defendant was then entitled to possession as against McCune or his grantees.

"That she had a right to recover possession by ejectment or to take possession, peaceably, if possible, concurrently with her action to foreclose. That having taken possession of the mortgaged premises lying vacant and unclaimed, pending foreclosure, defendant entered under equitable title deducible of record from the United States, and if she continued in possession of said premises by residence of her tenants for more than seven years prior to the commencement of this action, she was entitled to the protection of Sec. 4, Ch. 83, of the Rev. Stat. of Ill., barring the right of plaintiff to recover in this action.

"That defendant's equitable title under the mortgage became vested upon breach of condition, and if it appears from the evidence that the breach occurred prior to July 1, 1872, then the defendant had a vested equitable title prior to the enactment of Sec. 30, Ch. 77, Rev. Stat. Ill., and that statute being a limitation statute, affecting remedies, only, could not operate to divest the equitable title in defendant, and cut off the running of the statutory bar under Sec. 4, Ch. 83, Rev. Stat. Ill.

"XX. The court holds that in this action only the legal title can be considered. That by the trust deed of McCune to E. G. Johnson the legal title was, as between them, conveyed to Johnson as security for defendant's notes.

"That when default was made in the payment of said notes, the legal title in Johnson and the equitable title in defendant, as between them and McCune or his grantees, became absolute. That defendant was then entitled to possession as against McCune or his grantees.

"That she had a right to recover possession by ejectment or take possession, peaceably if possible, concurrently with her action to foreclose.

"That having taken possession before decree she became mortgagee in possession, entitled to hold possession, as against said McCune or his grantees, until payment of said mortgage indebtedness or redemption of the premises from sale.

"That the purchase of the property at the master's sale for a part only of the mortgage debt was not as between defendant and said McCune or his grantees, a payment or satisfaction of the mortgage debt, nor did the sale and certificate of purchase divest or transfer any title.

"That a statute of limitations barring recovery upon said mortgage debt or barring the right to a deed under the foreclosure proceedings affects their remedy only, and does not divest rights already acquired under said contract or proceedings, as actual payment of the indebtedness would. In this sense, barring the debt is not equivalent to payment. The debt still exists after the bar is complete.

"The court holds, therefore, that defendant is still in possession as mortgagee after condition broken and as against McCune or his grantees is entitled to retain possession until said debt is paid.

"XXI. The court holds that as between the mortgagor and the mortgagee, after condition broken, the legal title is in the latter and he may maintain ejectment.

"That defendant, Lydia Bradley, as *cestui que trust* in the McCune mortgage, became vested with equitable title to the premises when default was made in the payment of the mortgage debt.

"That by decree of foreclosure in *Bradley* v. *McCune,* her equitable title was confirmed, and McCune and his grantees thereafter had only an equity of redemption.

"That by the master's sale and certificate no change was made in the title, since the certificate did not purport to convey or vest title, but only a right to a title after the expiration of the period of redemption.

"That after the expiration of the period of redemption and failure of McCune or his grantees to redeem, their equity of redemption was cut off and they had no further interest in the premises.

"That defendant, being then in possession and having a right under her certificate of purchase to a deed conveying the legal title to her, was equitable owner of the premises.

"That Sec. 30, Ch. 77, Rev. Stat. Ill., being a limitation statute, affecting the remedy only, cannot divest or terminate the equitable title so vested in defendant, but can only be effective to cut off her right to a conveyance of the legal title.

"That if the equitable title so vested in defendant is deducible of record from the United States, and it appears that she was in actual possession by residence of her tenants upon said premises more than seven years prior to the commencement of this suit, then plaintiff is barred by Sec. 4, Ch. 83, Rev. Stat. Ill., from maintaining his action.

"XXII. The court holds that Sec. 30, Ch. 77, Rev.

Stat. Ill., is a limitation statute materially impairing the legal remedies provided for the enforcement of the mortgage contract, and that it cannot be applied to such contracts executed prior to its enactment without conflicting with Sec. 10, Art. 1, Constitution of the United States, and Sec. 14, Art. 2, Constitution of Illinois.

"That defendant's certificate of purchase derived under foreclosure of the trust deed of McCune to Johnson, dated August 13, 1868, did not become null and void under said statute at the end of five years from the expiration of the period of redemption, but her rights continued to be be fixed by the laws of this state in force at the date said mortgage was given.

"That the law of this state at the date of said mortgage was that after condition broken the mortgagee had absolute title and right to possession, while the mortgagor had only an equity of redemption. That after foreclosure and failure to redeem the mortgagor's title was extinguished.

"The court therefore holds that plaintiff's right, title, interest and equity of redemption were extinguished on the 27th day of January, 1881, when he or his grantee failed to redeem from the sale to defendant, and he cannot recover.

"XXIII. That by virtue of the decree rendered in the mortgage foreclosure proceedings, introduced in evidence herein, and the sale thereunder, and a failure to redeem therefrom within the statutory period, all the right, title and interest of said McCune, Prettyman and his grantee in said premises was cut off, destroyed and terminated, and in this proceeding they or either of them cannot affirmatively assert such alleged title against the defendant, Lydia Bradley."

ARGUMENT.

I.

The statute of 1872, understood as construed by the Supreme Court of Illinois, cannot constitutionally be applied to plaintiff in error's case, because her mortgage was executed and delivered before said statute was enacted.

If said statute has the effect ascribed to it by the courts of said state, it impairs the remedies available to plaintiff in error at the date of the mortgage, and her contract rights and vested rights of property, in two respects:

First, the title of the mortgagor is not completely divested by breach of condition, foreclosure, sale and failure to redeem.

Second, the mortgagee's title is rendered defeasible if she fails to take a master's deed within a certain time.

That these are material impairments will be evident from comparison with many parallel cases in this court.

In *Bronson* v. *Kinzie*, 1 How., 311, where the statute complained of gave the mortgagor twelve months to redeem after foreclosure sale, the court said:

> "It, the new act, declares that although the mortgaged premises should be sold under decree, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after sale; and it moreover gives a new and like estate to the judgment creditors to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be

> difficult to say at what point they must stop. * * * Any such modification of a contract by subsequent legislation against the consent of one of the parties unquestionably impairs its obligation and is prohibited by the constitution."

But in the case at bar the Supreme Court of Illinois has here held, in order to give said statute effect, that the title of the mortgagor is never completely divested unless the purchaser at the sale takes a deed from the master. This was distinctly stated in the first opinion of the court, published in Vol. 186 Ill., Rep. p. 526:

> "To hold that the mortgage remains in force (after foreclosure) would be to abrogate the statute, which would be of no practical effect, if the failure to take out a deed leaves the mortgage still in force. It is absurd to say that a mortgagee by neglecting or refusing to take a deed until the expiration of five years, can reinstate himself in the same position as before the purchase."

In the last opinion, contained in this record (p. 259), the Supreme Court of Illinois say (Print. Trans., p. 266):

> "When the certificate became void she ceased to have any interest whatever in the premises or any right to the possession. The judgment of the Circuit Court is affirmed."

It is evident that the court could not have affirmed a judgment in ejectment finding defendant in error the owner in fee simple of the mortgaged premises and awarding him the possession thereof without any payment of the mortgage debt, unless by holding that the mortgagor's title had not been completely divested by the foreclosure sale and failure to redeem. They must have held the title remained in the mortgagor and his grantees, subject only to the contingency that it should be divested *if the purchaser secured a deed from the master.*

Thus, the mortgagor's mere right of redemption existing at the time the mortgage contract was made, is enlarged by this later statute of 1872, so as to vest the mortgagor, or his grantee, with the legal title to the premises, freed and discharged of all title, right, interest, lien or claim of the mortgagee or of the purchaser at the foreclosure sale, without any redemption or payment of the mortgage debt at all. And the mortgagee and purchaser at the sale are divested of the legal title or the benefit thereof; and the purchaser in possession, with a complete equitable title, from and after the expiration of the period allowed for redemption, and right of possession, is divested of such equitable title and right of possession.

That was not the law of Illinois when this mortgage was given, nor prior to the enactment of the statute of 1872, as will appear later in this argument.

Carroll v. *Ballance*, 26 Ill., 9 (16, 17).
Chickering v. *Failes*, 26 Ill., 507 (519).
Nelson v. *Pinegar*, 30 Ill., 473 (481).
Kelgour v. *Wood*, 64 Ill., 345 (347, 348).
Oldham v. *Pfleger*, 84 Ill., 102 (103-4).
Rucker v. *Dooley*, 49 Ill., 377.
Bronson v. *Kinzie*, 1 How., 311 (318).

In *Bronson* v. *Kinzie*, this court was passing upon an Illinois statute, with reference to the laws of Illinois in regard to rights and remedies of mortgagees, which were the same at that date as at the date of plaintiff in error's mortgage. The impairment of remedy or right in the case at bar seems the more serious of the two, since it has resulted in the entire loss by plaintiff in error of the mortgaged property.

In *Barnitz* v. *Beverly*, 163 U. S., 118, the court held

that a state statute which authorized the redemption of property sold upon foreclosure of a mortgage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed cannot constitutionally apply to a sale under a mortgage executed before its passage. The court said by Mr. Justice SHIRAS (quoting from the *Brine Case*, 96 U. S., 637):

> "This court held through Mr. Justice Miller that all the laws of a state existing at the time a mortgage or other contract is made, which affect the rights of the parties to the contract, enter into it and become a part of it, and are obligatory upon all courts which assume to give a remedy on such contracts, * * * that it is therefore said that these laws enter into and become a part of the contract"—and (quoting from other cases)—"the remedy subsisting in a state when and where a contract is made and is to be performed is a part of the obligation."
>
> "What we are now considering is whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act (which provided that the land 'shall not again be liable for sale for any balance') does deprive the plaintiff of a right inherent in her contract."
>
> "When we are asked to put this case within the rule of those issues in which we have held that it is competent for the states to change the form of a remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute and to have regard to the probable effect on the rights of the parties."

In the opinion of the Supreme Court of Illinois in this case (Trans., p. 264) the cases here cited, and others to the same effect, are reviewed and recognized as correct

expositions of the law upon this subject; but they are said not to be in point. It is contended said statute of 1872 is "one of limitation and affected only the remedy. And it was held to be a valid law, taking away no vested right and leaving a reasonable time for the pursuit of the remedy." (P. 265.)

But what is the "remedy" referred to? If it is merely the right to take the master's deed, and a reasonable time is given for that purpose, and no penalty is attached other than the denial of a deed, it might reasonably be claimed that this was not a material impairment of remedy. But the act of 1872, as here construed and applied by the Supreme Court of Illinois, does not stop there. If it had, then plaintiff in error, being rightfully in possession, could not have been deprived of such possession if she had taken out no master's deed, because her *right* would remain unimpaired by the loss of her remedy, and being in possession she need resort to no remedy. The bar of the mortgagor's equity of redemption would not have been destroyed or affected by her failure to get the master's deed.

As the state court holds, "all statutes of limitation are based on *laches*" (Print. Trans., 263); and *laches* will not be imputed to one in the peaceable possession of land. *Mills* v. *Lockwood*, 42 Ill., 111 (118); *Dorman* v. *Dorman*, 187 Ill., 154 (160); *Wilson* v. *Byers*, 77 Ill., 76 (84); *Boyd* v. *Boyd*, 163 Ill., 611 (615); *Beck Lumber Co.* v. *Rupp*, 188 Ill., 562 (570); *Parker* v. *Shannon*, 137 Ill., 376 (392); *Bush* v. *Stanley*, 122 Ill., 406 (418).

A statute of limitations does not run against or affect a possessor of real estate, but against one out of possession. *Mills* v. *Lockwood*, 42 Ill., 111 (119); *Parker* v. *Shannon*, 137 Ill., 376 (392-3). And an entry once

made by a mortgagee suspends the operation of a statute of limitations. *Fountain* v. *Bookstaver*, 141 Ill., 462; *Altemas* v. *Long*, 4 Barr, 254; *Hinman* v. *Crammer*, 9 Barr, 40; *Altemas* v. *Campbell*, 9 Watts, 28; *Miller* v. *Shaw*, 7 S. & R., 129.

But if the "remedy" referred to by the state court is the right of the mortgagee to declare a forfeiture for breach of condition, to enter and hold possession of the premises after condition broken; the right to maintain ejectment if necessary to gain possession; the right to be considered the owner of the fee as against the mortgagor; to foreclose the equity of redemption of the mortgagor and extinguish his title unless he redeems within the time prescribed by law; if these are the "remedies" referred to and to be taken away because the certificate of purchase is annulled by the statute, then it will hardly be denied that this is a material impairment of the contract.

If the "remedy" so referred to and taken away, is, as it is here, the right and estate and possession, of a purchaser at a foreclosure sale, after the period of redemption has expired and her right to a deed and her equitable title has become complete,—then it is the taking of her property without due process of law. This equitable title and right of possession gave a perfect defense to this ejectment suit. *Stow* v. *Russell*, 36 Ill., 18, 36; *Steley* v. *Murphy*, 47 Ill., 244-5; *Kilgour* v. *Gockley*, 83 Ill., 109; *Sands* v. *Wacasser*, 149 Ill., 533-4.

The language of the statute itself is offensive to the Federal Constitution. It purports to annul a certificate of purchase unless a deed is taken under it within a certain time. The legislature had no such power. A court would have that power only after giving to the beneficial owner an opportunity to be heard. But as construed and

given effect to by the state court here, this statute goes even further. It purports to take away and restore to the mortgagor, without any redemption or payment of the mortgage debt, the legal title, discharged of the mortgage.

In *Newland* v. *Marsh*, 19 Ill., 376, when the direct import of the language of the statute was that one who had paid the taxes upon real estate for seven successive years under claim and color of the title "should be deemed and adjudged the legal owner," the court said:

> "The judicial department of the government, being ordained for the administration of the laws, under the sanctions of and in obedience to the mandates of the federal and state constitutions, and the limits upon the legislative power in them contained, will consider acts of the legislature in connection with these constitutions and their limitations, and give the force of law to acts of the legislature in so far, and in so far only, as they are within the competency of the law-making power.
>
> It is the province of the judiciary to declare what is the law, in any case given for judicial determination, and to enforce only valid enactments of the legislature.
>
> The constitution of this state provides, that no freeman shall, 'in any manner, be deprived of life, liberty, or property but by the judgment of his peers or the law of the land.'
>
> The citizen cannot be deprived of his property by involuntary divestiture of his right to it, or by such transfer of it to another, except by judgment of law; and the legislature, having no judicial power, cannot impart to their enactments the force of a judicial determination.
>
> The legislative power extends only to the making of laws, and in its exercise, is limited and restrained by the paramount authority of the federal and state constitutions. It cannot directly reach the property or vested rights of the citizen, by providing for the

forfeiture or transfer to another, without trial and judgment in the courts; for to do so, would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislature. It is, however, said that these trials satisfy the requisitions of the constitution, and are all that is contemplated by the provisions alluded to. This is a fallacy too patent for special notice.

These ejectments are brought to try the title, or right of possession, to land in controversy, and the defendants cannot recover upon paramount title, *to be made and created in them by the judgments in these actions.* If they recover upon paramount title, it is because the court finds the title in them; not by virtue of anything in these actions, but because pre-existing facts established, have confererd upon them the title.

Although the legislature cannot divest titles, and destroy vested rights, the same provisions alluded to, have existed, as constitutional law, for ages in the mother country, are adopted and reasserted by us, and with them have gone, side by side, the various limitation laws of both countries. The ground, however, upon which they are held consistent with the paramount rule stated, is, that they apply to the remedy only, affording reasonable and adequate opportunity for enforcement of the right. In other words, if the law strikes at the right, and by its own force, or in connection with facts *aliunde*, in themselves immaterial, annihilates it, or confers the right upon another, the legislature exercises judicial power, which it cannot do. But such is not the nature of limitation laws. Under them the right remains after the bar of the action is complete but without remedy of enforcement. 'No law impairing the obligation of contracts, shall ever be made.' Const. Ill., Art. 13, Sec. 17.

The theory of limitation laws is, that they affect remedy—limiting the period within which rights may be asserted or remedies resorted to—affording a time and opportunity of enforcing rights by legal remedies, and leaving the right untouched, but regulating or limiting the use of the remedy for asser-

> tion of the right or recovery of the thing to which it relates. And upon no other ground can the second section of the Act of 1839 be upheld and enforced, as within the limits of the legislative power.
>
> The language: 'Shall be held and adjudged the legal owner of such land to the extent, and according to the purport, of his or her paper title,' is contained in the first as well as the second section of the act; and the first section having been uniformly treated by this court as a limitation of the remedy, it would seem to follow that the second section may be so construed and enforced. But, treating the second section according to the literal import of the words, the effect is, that the title of the owner is taken from him and conferred upon another, by force of the acts of paying the taxes for the seven years under color of title, and such construction, we hold, would render this section null and void."

The Supreme Court of Illinois might have given analogous construction to the statute of 1872, and held that it cut off merely the right to have a deed after the time limited, leaving plaintiff in error in possession of the rights and title she had acquired under her mortgage, and such construction would not have been subject to criticism. Such was the construction put upon this act by the minority of the state court. (Print. Trans., 266, 269.)

But instead of limiting said statute to constitutional bounds, said court seems to have given it the widest possible construction.

They have extended the penalty named in the statute to the mortgage itself, on the ground that "to hold that the mortgage remains in force would be to abrogate the statute, which would be of no practical effect if the failure to take out a deed leaves the mortgage still in force."

Lightcap v. *Bradley*, 186 Ill., 526.

This view of the effect of foreclosure upon the mortgage was not entertained before the enactment of the statute of 1872. In the case of *Williams* v. *Brunton*, 3 Gilm. (Ill.), R., 600, King, a mortgagee of Brunton, who had foreclosed his mortgage and become a purchaser at the sale, applied to be permitted to defend the action of ejectment brought by Williams. This application was resisted on the ground that King had no privity with Brunton, the mortgage having become extinguished by the foreclosure. In passing upon this point the court said (p. 622):

> "It is said, however, that the relation previously existing between King and Brunton ceased, a judgment of foreclosure having been obtained by King. It is true that a judgment or decree may, for some purposes, be considered as an extinction of the original cause of action; for instance, for the purpose of regulating the interest on money to which a party is entitled before final satisfaction of the debt, as was the case in 3 Scam., 263, to which authority the appellant has directed our attention. But it is equally true that for many other purposes, as for the ascertaining of priority of liens, for instance, the principle of extinction or merger finds no application. It is, in our opinion, a total misapprehension of the doctrine on mortgages, to contend that a mortgagee who, instead of foreclosing strictly, which would at once have given him the indefeasible legal estate, applies for a sale of the lands so as to have his debt satisfied and no more, the mortgagor being entitled to the surplus, if any, and who obtains a judgment or a decree, should thereby wholly lose the benefits of the title which he had by the mortgage. We consider a decree and a subsequent purchase and obtaining of a deed for the land from the master or sheriff as being connected with and as being in aid of his original title. A subsequent title so obtained is clearly consistent with the first title. It is hardly necessary to refer to authorities in support of this proposition."

The views here expressed were never departed from prior to 1872, and are referred to as authority in *Kruse* v. *Scripps*, 11 Ill., 98 (104), and *Farrar* v. *Payne*, 73 Ill., 88, decided in 1874.

The said statute of 1872 has, therefore, impaired the obligation of plaintiff in error's mortgage contract,

First, by creating in the mortgagor an estate after foreclosure and expiration of the time for redemption.

Second, by destroying, or at the least reducing, the title of the mortgagee after condition broken, foreclosure, sale and expiration of the period of redemption to an estate for five years, unless a master's deed is taken within that time.

II.

At the date of plaintiff in error's mortgage there was in force Section 13, Ch. 57, R. S. Ill., 1845, which we have set out *in hæc verba* in the statement of questions involved.

This statute and its construction constituted one of the obligations of the mortgage contract.

The uniform construction of the said statute prior to 1872, had been that if the mortgagor, or his grantees, failed to redeem within the time limited, his equity of redemption was barred and his title gone.

McLagan v. *Brown*, 11 Ill., 519.

This was an action in ejectment, and the facts appear in the opinion of the court. The court say:

> "The premises in question were sold to A. L. Holmes, under his judgment, on the 29th of August, 1846, who assigned his certificate of purchase to Cooney, on the 27th day of August, 1847, and he

assigned to Johnson, on the 24th of November, 1847. On the 10th of March, 1847, the judgment debtor conveyed the premises to W. Holmes and Mary Burgess. On the same day the Browns obtained their judgment, which, however, did not become a lien upon the debtor's real estate till the 23rd of the same month. They redeemed from the sale to A. L. Holmes, on the 27th day of November, 1847, two days within the fifteen months from the date of that sale, and resold the premises on the 21st day of December, 1847, and purchased them in at the amount of the redemption money, and took a sheriff's deed. Their judgment, under which they were redeemed, was reversed at the December term of this court, 1848.

It will be seen that the judgment debtor sold his equity of redemption to W. Holmes and Burgess, before the Brown judgment became a lien upon the premises. They, however, never redeemed, and the question is, could the last judgment creditors redeem from the first sale, after the expiration of the twelve months, within which the purchasers from the judgment debtor might have redeemed? We think, according to the decision in *Saveezy* v. *Chandler*, 11 Ill., 445, they did possess that right. In principle, there is no difference between that case and this, so far as this question is concerned. There the Chandlers were held to be the assignees of the judgment debtor, and as such, bound to redeem within the twelve months, although they obtained their title under a sheriffs' sale. Certainly Holmes and Burgess are none the less such assignees, because they obtained their title by a voluntary conveyance from the debtor. The rights acquired and duties imposed under either purchase were the same. Both had a right to redeem, which was paramount to the right of any judgment creditor, who had not acquired a lien before the date of their purchases; which right, however, they were bound to exercise within the twelve months, and if they neglected to do that, their rights of redemption were entirely and forever gone. They ceased to have any more rights

or interest in the premises than if they had never possessed the right of redemption. That right had expired by the lapse of time, and could not with propriety be thrust in between the conflicting claims arising under the sale upon the first judgment, and the right to redeem claimed under the last. Upon the termination of their rights, the case stood as if they had never existed, and had there been no assignment of the equity of redemption, the right of the subsequent judgment creditors to redeem would never have ben questioned. Allowing the right of redemption to the last judgment creditors is doing no violence to those who had no right to violate, and the purchaser under the first judgment cannot complain, for he purchased with the express condition imposed by the statute that 'any judgment creditor' might redeem after the expiration of twelve and within fifteen months from the date of his purchase."

Massey v. *Westcott*, 40 Ill., 160, was a bill in chancery by which redemption by a judgment creditor was questioned. The material facts appear from the portion of the opinion quoted:

"It is also contended by counsel for appellant that the redemption by Cooper was one day too soon, and, therefore, irregular and void. This is a question which in no wise concerns the appellant, and which he cannot raise. Neither the judgment debtor nor the appellant, as his grantee, sought to redeem within the twelve months allowed to them. Their title was, therefore, gone, so far as it depended upon the sale under the Till and Knevels' judgment, and whether it was conveyed by the sheriff to Till and Knevels as the purchasers under the execution sale, or to Cooper as a redeeming creditor, was immaterial to them. If Cooper's redemption was irregular, either Till and Knevels or any other person seeking to redeem might question it, but they seem to have accepted the redemption money and thereby waived any irregularity, if such there was, and persons not injured cannot complain. *Blair* v. *Chamblin*, 39 Ill., 521."

No other construction has ever been put upon said statute of 1845, as will appear from the many subsequent decisions of the Supreme Court of Illinois, cited under Sec. III of our brief (*supra*, p. 22).

The twentieth error assigned in the Supreme Court of Illinois, and the XV proposition of law submitted to the trial court presented this defense. Both were overruled, but the opinion of the majority of the Supreme Court of Illinois is silent upon this point. They do say, however, in the closing sentences of the opinion, that "the foreclosure was not abortive in any respect, but a sale was regularly made and approved by the court and a certificate of purchase issued and delivered to the defendant, which became void under the provisions of the statute through her neglect."

Mr. Justice WILKIN, however, in his dissenting opinion (Print. Trans., 266-9) states the law upon this point as we understand it. He says:

> "It is a rule of universal application that where a mortgagor, after foreclosure and sale, allows the time of redemption fixed by the statute and decree of foreclosure to expire without justifiable excuse, failing to make redemption, his rights are forever gone. * * * Therefore, upon the expiration of the time for redemption, the rights of McCune, as mortgagor, and of Prettyman, his grantee, were forever barred and foreclosed. Appellant was in the exclusive possession of the premises and had been for several months. Whether that possession, during the period of redemption, was so far by the acquiescence of the mortgagor or his grantee as to be lawful or not, there can be no serious question that after the expiration of the time for redemption she was the owner of the premises and entitled to the possession thereof, and, upon application to the master, entitled to a deed; and during the period of five years in which she might lawfuly have obtained a

deed there can be no serious claim that any right or title remained in the mortgagor, or his grantee, Prettyman. It is true that by failing to take a deed within the five years her right to do so became barred under the statute of 1872, but the question now is: Did the mortgagor, by that failure, become reinvested with the title, and if so, upon what principle did he do so? Manifestly, the statute of 1872, as one of limitation, affecting only the remedy of Mrs. Bradly to obtain a deed, could not operate to vest the title in any one else. To hold that it could would be to defeat the act upon the ground of its unconstitutionality. (*Ryhiner* v. *Frank*, 105 Ill., 326.)"

Upon the first hearing, *Lightcap* v. *Bradley*, 186 Ill., 531, the court expressed its views upon this point as follows:

"The relation created by the statute upon the sale of the premises was the only remaining relation between the parties. As against the purchaser, the mortgagor had only a right to redeem from the sale, and it is argued that because there was no redemption the title of the mortgagor was absolutely gone, and, therefore, he could never afterward assert title under any circumstances.

As we have seen under repeated decisions, the premises are discharged of the lien of the mortgage and the obligation is transferred into the new lien. Necessarily, the title is in the mortgagor, subject only to that lien, and while, as against it he has nothing but a right of redemption, as against all the rest of the world, he is the owner. He has a right of possession, and his estate is alienable and devisable as before. After twelve months his creditors may redeem, and an execution against his lands and tenements is levied, in such case, upon the land. If at a sale it brings more than the charges against it, he is entitled to the surplus as arising out of his property and estate. The certificate of purchase does not transfer title, but only assures to the purchaser a conveyance of the legal title if the premises are not

redeemed. If the certificate of purchase becomes null and void by virtue of the statute of limitations, or otherwise, so that the premises are freed from the lien, the mortgagor is then the absolute owner. The lien of the mortgage and the title of the mortgagee cease by operation of law when the debt or obligation is barred by the Statute of Limitations. (*Barrett* v. *Hinckley, supra.*) And there is no difference, in principle, where the limitation runs against the new lien in the form of a certificate of purchase.

In *Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327, the question being whether a mortgagor had any insurable interest in the mortgaged premises after a decree of foreclosure and sale, it was held that he had, and the court said: 'His estate, as mortgagor, would not have been lost until the expiration of his right to redeem. In this state the purchaser under a sheriff's sale upon judgment and execution, or at a master's sale on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien, in order to cut off intervening incumbrances, but it will not carry back the absolute divestiture of title as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits.' The mortgagor still has the estate of a mortgagor, but the amount and time of redemption have become absolutely fixed by the decree of sale. (2 Jones on Mortgages, Sec. 1661.) After the expiration of the period of redemption the title of the mortgagor would be entirely gone, in the sense that the purchaser had become absolutely entitled to a conveyance of it, and in this sense it has often been said that his title is gone, *but it is never actually out of him until* a conveyance is made."

This may be considered the strongest statement the court were able to make of their views and holdings upon the question under consideration. No authority is cited,

and none exists, to support the claim that "in this sense we have held, etc." On the contrary, all the authority, both of courts and text writers, is the other way. Some of these we have already quoted. Many more are referred to in our brief. One of these we will quote, because it is a late case, the circumstances are the same as in the McCune case, and the decision depended upon the question whether the mortgagor had any title of any kind after his time for redemption expired.

Burgett v. *Osborne*, 172 Ill., 227 (238), where it is said:

> "A foreclosure decree had been rendered against the appellant, Heffron, for a very large amount; and, under this decree, the hotel property, located upon Lots 15 and 16, had been sold to Horace E. Hurlbut on March 19, 1894, for $146,747.15. A certificate of purchase was issued by the master in chancery, who made the sale, to Hurlbut. The time of redemption allowed Heffron to redeem from this sale, expired on March 19, 1895. On April 17, 1895, the certificate of sale was transferred to the appellant, Frank S. Osborne. When such transfer was made, Heffron had no interest whatever in the property. His right to redeem, which lasted during the year from March 19, 1894, to March 19, 1895, had expired. During the three months thereafter up to June 19, 1895, only his judgment creditors had a right to redeem."

And because all his right, title and interest of every kind are gone upon his failure to redeem, the mortgagor cannot object to any irregularities in the sale made by a redeeming creditor, as he is not injured. *Bozarth* v. *Largent*, 128 Ill., 95 (107, 108). And for the same reason the sale upon such junior judgment "is of nothing that belongs to him." *Smith* v. *Mace*, 137 Ill., 68 (78), and cases cited.

The language in the majority opinion, upon the author-

ity of *Smith* v. *Smith*, 32 Ill., 198; *Seligman* v. *Laubheimer*, 58 Ill., 124; *Ogle* v. *Koerner*, 140 Ill., 170, and *Davis* v. *Dale*, 150 Ill., 239, that "the sale discharged the land from the trust deed" (Print. Trans., 263), was not that, *prior to* or *without* the statute of 1872, the legal title, which was absolute at law in the mortgagee, was upon the sale divested and revested in the mortgagor or his grantee, without any redemption or payment. That would be a too obvious misunderstanding of those cases, which were cases in equity and did not so rule or involve any such question or the question of the legal title at all. Indeed, the equitable rule here cited only applies *where the sale has realized the whole amount of the debt, interest and costs which are due;* and that was not the case here. *Bogardus* v. *Moses*, 181 Ill., 551 (559); *Davis* v. *Dale*, 150 Ill., 239. But the ruling of the opinion here is, in effect, that the estates and rights of the mortgagor and mortgagee, respectively, were changed by that statute of 1872, and the legal estate and right of the mortgagor enlarged and the estate and right of the mortgagee lessened, as follows:

Under the law existing at the time this mortgage was made, the only right of the mortgagor, after condition broken, was that he could regain the legal estate, and that only by payment or redemption. Before foreclosure in equity he had only the equitable right of redemption, which he could avail himself of only by resorting to a court of equity. After sale under foreclosure decree he could redeem therefrom only in the mode prescribed by the statute and within one year. At the expiration of that period *all his right was forever gone.* Under the same law, the mortgagee purchasing at the sale had the absolute unconditional right either to receive full payment according to

the redemption law or to hold the possession as well as receive the legal title to the land purchased; and the legal title given by the mortgage was in aid of that right. *Williams* v. *Brunton*, 3 Gilm., 622-23; *Kruse* v. *Scripps*, 11 Ill., 104; *Farrar* v. *Payne*, 73 Ill., 88.

On the other hand, by force of this statute of 1872, the mortgagor's right of redemption is enlarged into a legal estate, which does not depend upon the condition of making any redemption or payment whatever, but is created and made perfect and freed from all claim or defense or right to hold possession, of mortgagee or purchaser, upon the happening of a new event. And the mortgagee's legal title, and the equitable title of the purchaser, fortified by actual possession, and so unaffected by any statute of limitations, is taken away.

The language of the majority opinion of the state court above quoted that the foreclosure sale under the decree in equity "discharged the land from the trust deed and transferred the lien created by the contract into a statutory lien by the certificate of the purchase" appears to be the basis of the opinion. As here applied in a suit at law in ejectment, to divest the legal title in the mortgagee and to vest it in the mortgagor, without any redemption or payment, it was never laid down as the law in Illinois. The cases of *Smith* v. *Smith*, 32 Ill., 198; *Seligman* v. *Laubheimer*, 58 Ill., 124; *Ogle* v. *Koerner*, 140 Ill., 170, and *Davis* v. *Dale*, 150 Ill., 239, cited in support, are not authority for any such ruling. Those cases were all suits in equity where a mortgage is regarded as a mere lien, and the rule as to the nature and effect of a mortgage as a conveyance of title is different from that at law; in none of them was the question of the legal title, nor the question presented in this case, in any way involved. In

Smith v. *Smith* the only question was whether a foreclosure could be had upon the unmatured portion of the mortgage debt, or whether the decree should provide for the payment, out of the proceeds of sale, of notes not due. Nothing was held as to the effect of the foreclosure sale upon the title. In *Seligman* v. *Laubheimer* the only question involved was as to the effect of a redemption by a second mortgagee from foreclosure sale under first mortgage, viz.: Did such redemption leave the land still subject to the unpaid portion or deficiency of the foreclosure decree under the first mortgage? The ruling was that it did not; that the redemption by the holder of the second mortgage was not such a mere delusion or trap for the unwary as would be the case if it resulted in leaving the land still subject to a second sale to pay the balance of the first mortgage debt. The same question and ruling are found in *Ogle* v. *Koerner*. In *Davis* v. *Dale* the ruling was that when the mortgaged *premises were bid off by the mortgagee, at the foreclosure sale, for the full amount of the decree, interest and costs*, the owner of the equity of redemption, and not the purchaser, is entitled to the possession and rents, during the period of redemption, and in any event, if held by a receiver, the possession and receipt of rents by the receiver would be for the benefit of the person entitled to the same. What was said by the court there must be taken as applicable to the case in equity before the court. And the same limitation of the rule to cases where the sale brought the full amount of the decree, was laid down in *Bogardus* v. *Moses*, 181 Ill., 554 (559); and it was recognized that a different rule would be applicable if there had been a deficiency (p. 560).

None of those cases justify a ruling at law in ejectment

that upon the sale under a foreclosure decree in equity the mortgagor becomes reinvested with the legal title; or that after his right of redemption has expired, and the purchaser's right to a deed (and so his equitable title) has become absolute, and is fortified by possession, the mortgagor, or his grantee, can, without redemption or payment, recover the premises, because the enactment of a limitation statute has cut off the purchaser's remedy of getting the master's deed. None of those cases was intended to overrule the rule laid down in *Williams* v. *Brunton*, 3 Gilman, 623; *Kruse* v. *Scripps*, 11 Ill., 104, and *Farrar* v. *Payne*, 73 Ill., 88, that the foreclosure decree and sale thereunder to the mortgagee is consistent with and in aid of the title conveyed to him by the mortgagee, and not in destruction thereof.

The law as it stood at the date of the McCune mortgage constituted a part of its obligation. Plaintiff in error is, therefore, entitled to have said statute of 1845 enforced in the foreclosure of that mortgage; and if said statute of 1872 materially affects this remedy, it violates Sec. 10, Art. 1 of the federal constitution.

III.

The decision of the Supreme Court of Illinois in this case deprives plaintiff in error of her title to the premises in controversy without due process of law, contrary to the fourteenth amendment of the federal constitution.

Plaintiff in error had a vested title to said premises after breach of condition, while the grantor of defendant in error had only an equity of redemption.

After the foreclosure, purchase and expiration of re-

demption she had the whole title to the premises and was in possession under that title.

The authority for these claims must be found in the decisions of the courts of last resort in Illinois, a few of which are cited in our brief. We will quote briefly from one or two.

Carroll v. *Ballance*, 26 Ill., 9, is considered a ruling case upon this question. Mr. Justice BREESE in that case said (p. 16):

> "The questions presented by this record are: Can a mortgagee, the mortgage debt being payable by installments, for which separate notes are given, recover the mortgage premises in ejectment against the mortgagor, or those claiming under him, when one or more notes are due and unpaid, and without notice to quit to the party in possession, before action brought?"

And again:

> "This court has held, in accordance with rulings of the English courts of common law jurisdiction, that as an incident to this ownership in the mortgagee, he can enter before condition broken or bring ejectment. He is considered the owner of the fee, having the *jus in re* as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner. *Delahay* v. *Clement*, 3 Scam., 202; *Vansant* v. *Allmon*, 23 Ill., 33."

The English and American cases are then reviewed at some length, and the conclusion reached is expressed in the following language (p. 20):

> "We think it is settled that a mortgagee may maintain ejectment, on condition broken, without notice to quit, and that the condition is broken when one or more installments are due and unpaid; because, the condition being an entirety, it is indivisible, and a failure to pay any part of the debt is a breach of the condition."

In *Chickering* v. *Failes,* 26 Ill., 507 (519), it is held:

"By the mortgage deed the legal title passes to the mortgagee, but in equity, the right of redemption remains in the mortgagor, even after the condition broken. But at law, after condition broken, the mortgagee may bring his ejectment and recover possession. The mortgage is a deed of conveyance with a condition annexed, and purports on its face to convey the title, but the condition authorizes the mortgagor to defeat the title thus conveyed and to reinvest it in himself, by a performance of the condition. After a failure to perform the condition, the title apparently becomes absolute in the mortgagee, and is clearly color of title."

In *Mulvey* v. *Gibbons,* 87 Ill., 367 (382), the court said:

"At the date of the decre (a decree *nisi* in strict foreclosure) and for a considerable time afterward, the property was worth very much less than the amount due of the mortgage debt. The decree determined the rights of the parties, that unless the amount due was paid within thirty days, the defendants should be debarred from all equity of redemption, of the premises. There is no pretense of the payment of any part of the money, or of excuse for non-payment, or of any readiness or disposition to pay anything. Why, in reason and justice, should not the right of redemption be barred as the decree declared?

The absence of a further order of confirmation was here a lack of but the merest technical form. According to the rule as laid down by Daniell, if the defendants did not pay the money the plaintiff's right to the property became absolute, though in order to complete his title there must have been a final order confirming it.

If the plaintiff's right to the property had become absolute, how, before a court of equity, could that consist with any remaining right of redemption in the defendants? Why, in that court, where the real right, regardless of form, is regarded and given

effect to, should not such an absolute right, as thus declared, be recognized and asserted?

"In *Kenyon* v. *Shreck*, 52 Ill., 383, this court recognize and declare the principle that the right of a mortgagor or his grantees to redeem after condition broken is a purely equitable right, which can be asserted only in a court of equity, and when its assertion would be plainly inequitable, that court will withhold its aid; and that where a defective foreclosure has been had, such equity of redemption will not be permitted to be asserted against an equity still stronger. And see *Hamilton* v. *Lubukee*, 51 Ill., 420; *Munn* v. *Burges*, 70 *id.*, 604; *Bush* v. *Sherman*, 80 *id.*, 160."

In *Bronson* v. *Kinzie*, 1 How., 311 (318), this court held the law of Illinois to be as follows:

"According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant (mortgagee), upon the failure of the mortgagor to comply with the conditions contained in the proviso; and at law, he had a right to sue for and recover the land itself. But in equity, this legal title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor. *Conard* v. *The Atlantic Insurance Company*, 1 Pet., 441. It is upon this construction of the contract that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee; and never deprive him of his right at law until his debt is paid; and he is entitled to the aid of the court to extinguish the equitable title of the mortgagor, in order that he

> may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay."

If the title to the mortgaged premises was vested in plaintiff in error by the law of the land as promulgated by the courts of last resort at the date of the mortgage contract, a subsequent change of that law by a court of last resort, the effect of which is to deprive plaintiff in error of her title or her right of possession is a public act, by and under the authority of the state, and within the prohibition of the Fourteenth Amendment of the Federal Constitution.

A few quotations from the many decisions of this court upon this point will confirm this statement.

In *C., B. & Q. Ry.* v. *Chicago*, 166 U. S., 226, the property of the railroad company was taken for a street in condemnation proceedings which were regular according to the statute, but the verdict of the jury and the judgment of the court awarded only nominal damages, $1. This proceeding was alleged to be in contravention of the Fourteenth Amendment, taking property without due compensation. The court said in part:

> "But a state may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment."

And much more is there said, both in the opinion of the majority and in the dissenting opinion, confirming the correctness of the contention we are making in this case, viz.: that if the equitable title once vested in plaintiff in error by the acts of the parties under the law as then understood and promulgated, it cannot be afterwards divested by a change of judicial holding.

In the case of *Bank of Kentucky* v. *Stone*, affirmed in this court without opinion, May 15, 1899, the charter of the bank exempted it from taxation for a certain time, and the Supreme Court of the state construed the charter as a contract which could not be repealed. Afterwards, however, the same court changed its views and upheld a tax levied against the bank. In the Circuit Court the published opinion seems to indicate that this was the material point in the case and their opinion holding that such a change of judicial construction was a violation of constitutional restrictions was apparently affirmed by this court. (88 Fed. Rep., 383.)

In *ex parte Virginia*, 100 U. S., 339, the constitutional question arose upon indictment of a county judge for excluding negroes from the jury list. Held, that his act was in violation of the Fourteenth Amendment, since he represented the state, was clothed with power to act by the state, and through him the state deprived negroes of rights guaranteed by the constitution. In this case the act was not judicial, but administrative.

In *Scott* v. *McNeal*, 154 U. S., 34, the federal question was whether the Fourteenth Amendment of the Constitution was violated by a decision of the State Court in an action of ejectment sustaining the title of defendant in error, who derived title through an administrators' sale, where it subsequently developed that the person whose estate was administered was not dead.

The court said (p. 45):

> "The 14th Article of Amendment to the Constitution of the United States, after other provisions which do not touch this case ordains, 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person with its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities." Citing *Virginia* v. *Rives*, 100 U. S., 313, 318, 319.

In this case it is submitted that the State of Illinois by this act of 1872 of its General Assembly, as construed and given effect to here by its Supreme Court, plaintiff in error has been deprived of her property without due process of law, and her contract rights have been impaired.

IV.

Plaintiff in error had an equitable title to the mortgaged premises at the time when she was entitled to a deed from the master January 27, 1881; and if said title was not divested when the certificate of purchase became "null and void" under the statute of 1872, then this title is sufficient to bar the action of defendant in error.

The statute of Illinois, which was first enacted in 1835, and is set forth at page 18, *supra*, protects such title.

The evidence shows that from and after the time when the period of redemption expired, the plaintiff in error, by her tenants, possessed said land by actual residence thereon for more than seven successive years. (Print. Trans., 38.) At that time Mrs. Bradley had "a connected title, in law or equity, deducible of record from the United States." This chain of title is in evidence. (Print.

Trans., 62 to 89, 95, 141, 142.) The mortgage trust deed to Johnson, her trustee, is to be regarded as conveying the legal title, which may be here invoked for her. But her title "in equity" was complete within this statute, if she could not invoke that legal title in Johnson, trustee. Her right to a master's deed conveying to her the legal title, became complete on January 27, 1881, when the period for redemption expired. That right, which was then complete, gave her a complete title in equity; and the legal title was in trust for her; and her possession by residence under such title having continued over seven years, this statute furnished a complete bar to the action of ejectment.

In *Collins* v. *Smith*, 18 Ill., 160, it was held that the language of the act "having a connected title in law or equity deducible of record," embraced the title in equity by a resulting trust; and that the title was "deducible of record" to every person who could connect himself with it by such proofs as are competent for any purpose to establish the kind of title under which he claims; and that "although an equity link would not sustain an ejectment suit under the statute, it may defeat it, and so may be put in by parol evidence, when it is of a character to be established by that character of parol." And such was the rule of construction of the statute in Kentucky, from which state this statute and its construction was adopted by Illinois.

Poage's Heirs v. *Chinn's Heirs*, 4 Dana, 4.
Collins v. *Smith, supra.*
Martin v. *Judd*, 81 Ill., 488.

And the same construction and effect was given to this act by this court in *Dolton* v. *Cain*, 14 Wall., 472, where the court said:

"It is objected that the entire title of the defendant is not evidenced by acts of record, but this is not necessary. If the source or foundation of the title is of record, it is available to every person claiming a legal or equitable interest under it, who can connect himself with it by such evidence as applies to the nature of the right set up. (*Collins* v. *Smith*, 18 Ill., 163; *Poage's Heirs* v. *Chinn's Heirs*, 4 Dana, 4.) Is the right set up by Cain, then, within the purview of the statute? It is conceded to be, if the bond was executed under a valid power of attorney, coupled with full payment of the purchase money, and the obligor had the legal title to the land. This concession was necessary, because it is too plain for controversy that the union of these elements would constitute a complete equitable title, which a court of chancery on the proper application would perfect into a legal title."

This was the law of Illinois when the mortgage contract in question was made, and as such was a part of that contract. It was a valuable part of the contract and of the property right acquired by plaintiff in error thereunder, of which she could not be deprived.

Bronson v. *Kinzie*, 1 How., 311.

In other words, under this contract, as a part of the security acquired by Mrs. Bradley, a purchaser at the mortgage sale who should be in possession of the premises, upon the expiration of the period of redemption, and who should have possession by residence thereof, by himself or his tenants, for seven consecutive years, could not be ousted therefrom by the mortgagor or his grantee, although he might never secure the master's deed. The master's deed was not a necessary or important muniment of title. And the equitable title being complete at the very instant when the period of redemption expired and the right to the master's deed had accrued, the certificate

of purchase became at that instant *functus officio*. The "lien" of the certificate of purchase (as it is called in some of the opinions in equity cases cited by the majority opinion of the said court) became merged into a complete equitable title at the very instant when the period of redemption expired. It was no longer a lien, but was a complete equitable estate.

Now, by the provision of the act of 1872 in question that "when such deed is not taken within the time limited by this act"—which is five years after the equitable title so becomes complete—"the certificate of purchase shall be null and void", as that provision is construed and applied by the Supreme Court of Illinois in this case, this contract right of plaintiff in error is plainly impaired. Instead of a *complete* equitable estate in the purchaser at the expiration of the period of redemption, there is, by force of this state, at most, a *base* or *determinable* estate, which is determined and ended, *ipso facto*, by the failure of the purchaser, although in possession, to get a further muniment of title, which was theretofore unnecessary.

This defense has been presented on every hearing before the Supreme Court of Illinois. (See proposition of law XVII, Trans. p. 285.) No comment is made upon this point in the opinion upon the last hearing. No doubt that court considered it had said enough upon this point on the previous hearing.

At that time in *Lightcap* v. *Bradley*, 186 Ill., 511, the court said (p. 530):

> "The second claim, under Section 4 of the Limitation Act, is even less tenable than the other. Under that section something more than mere color of title is required. The title must be such as is *prima facie* good, and such as courts will enforce unless rebutted or destroyed by evidence of a better title. (*Moore*

> v. *Brown*, 52 U. S., 414.) Inasmuch as the land had been freed by the sale from the lien of the trust deed, and the certificate of purchase did not pass title but was only an inchoate right to a title upon a certain condition, the defendant showed no title under Section 4."

But a purchaser has a complete equitable title when he is entitled to and may compel a conveyance.

Dolton v. *Cain*, 14 Wall., 472, 476.
Chappell v. *McKnight*, 108 Ill., 570, 575.

And plaintiff in error had a right to a deed, and so had a complete equitable title when the time for redemption had expired, and she became entitled to the master's deed. That right was not any longer *"inchoate,"* but was a then present, complete and unconditional right.

We understand the passage above quoted from, 186 Ill., to mean that the Supreme Court of Illinois holds that after the foreclosure, sale, purchase by plaintiff in error and expiration of the period of redemption, plaintiff in error had no equitable title, "inasmuch as the land had been freed, by the sale, from the lien of the trust deed." But if that were so, this equitable title, which was derived through the sale and the expiration of the period for redemption, was not affected by that fact. But, as we have shown, that was never before the law as to the property sold, so as to affect the legal title to the property covered by the sale.

That a foreclosure and sale for a part of the mortgage debt releases the land from any further lien for the remainder of the debt is a necessary consequence. The cases cited by the courts in support of the foregoing text (*Smith* v. *Smith*, 32 Ill., 198, and *Rains* v. *Mann*, 68 Ill., 264) are to that effect, but do not support the court

in the conclusion that the trust deed is released *as to the amount bid*. It would be absurd to suppose a mortgagee who bought at his own sale would thereby diminish his title.

The statement by the Supreme Court of Illinois, in connection with the foregoing quotation, in commenting upon *Williams* v. *Brunton*, that "the very case cited, upon which the decision of the court rested (*Den* v. *Stockton*, 7 Halst., 322), decided that a sale does divest or suspend the legal estate or right of possession of the mortgagee," is a mistaken one. On the contrary, it is decided in that case (*Den ex Dem. Hart* v. *Stockton et al.*, 7 Halst., 322; 12 N. J. L., 370) that the mortgagee, after foreclosure, sale and purchase at his own sale may maintain ejectment against the mortgagor. The court there said:

> "These proceedings, although held by the defendants to be entirely void, are supposed to interfere with and destroy all right of action on the original mortgage. But why this should be the effect of them it is not easy to discern. By bidding at the sheriff's sale, and accepting a deed, Jane Hart acknowledged no title inconsistent with her own. That act was intended to come in aid of her mortgage, and to perfect her title. Such would be its effect if the proceedings are valid. But if they are void, it is not perceived how they could take away her rights of action on her mortgage. There is nothing in the nature of these proceedings which divests, or suspends, the legal estate and right of possession, until a sale takes place. By that, the estate of both mortgagor and mortgagee are transferred to the purchaser. In this case, Jane Hart was herself the purchaser, and of course, if the sale was valid, has a right to recover by virtue of it; but if not valid, her mortgage title must remain. A mortgagee may bring ejectment pending a bill to foreclose. There may be circumstances under which a court of equity will interfere,

but when it does, it generally requires the mortgagor to give security to redeem. Powell on Mortgages, 477."

We have already cited and quoted abundant authority to show that the foreclosure and sale are connected with and in aid of the original title in the mortgagee.

Further light is thrown upon the relations of mortgagor and mortgagee and purchaser by *Bruschke* v. *Wright,* 166 Ill., 183. There was a foreclosure and sale of the premises to one Gehr for the amount of the mortgage debt, with a supplemental agreement to pay the heirs of the mortgagor in addition to the amount bid, the balance of $10,000, before taking deed. The purchaser, Gehr, having to borrow money, assigned the certificate to Wright, who knew nothing of the agreement. After expiration of redemption Wright applied for a deed, and this was resisted by the heirs of the mortgagor.

In considering the relations of the parties the court say (p. 195):

"We regard the doctrine of subrogation as applicable to such a case as is here presented. Inasmuch as the money advanced by Wright was used for the purpose of paying off the mortgage upon the property, a court of equity will subrogate Wright to the rights of Troost, the original mortgagee, and regard the decree, which was in fact paid off by the proceeds of the master's sale, as subsisting for the purpose of being enforced for the benefit of Wright. The general doctrine is, that a purchaser at a foreclosure sale will be subrogated to the rights of the holder of the mortgage, which has been discharged with the purchase money, in the event that the sale is ineffectual to convey title to the property sold.

In *Brobst* v. *Brock,* 10 Wall., 519, it was held, that an irregular judicial sale, made at the suit of the mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale the rights of the mortgagee as such."

If plaintiff in error by purchasing at her own sale, became subrogated to the trust deed, to the extent of her bid, she has an equitable title.

Such, at least, was the law in Illinois at the date of the mortgage contract.

If the change in the law be ascribed to the statute of 1872, it comes under the prohibition of Sec. 10, Art. 1 of the Federal Constitution.

If the change in the law be the result of altered judicial construction of the mortgage contract, which results in diverting the equitable title plaintiff in error had under the law as it was promulgated at the date of her mortgage contract, then it comes under the prohibition of Sec. 1 of the Fourteenth Amendment to the Federal Constitution.

But if such equitable title has not been divested in either of said ways, then it fulfills all the requirements of said statute. Sec. 4, Ch. 83, Rev. Stat. Ill. (quoted, *supra*, p. 18).

This is the same statute as Sec. 8, Ch. 66, Rev. Stat. 1845, referred to in *Collins* v. *Smith*, 18 Ill., 160, from which we quote to show that a resulting trust is, within the meaning of said statute, an equitable title. The court there say:

> "In deraigning title from an administrator's sale and deed, made under an order of sale for the payment of debts of deceased, the plaintiff offered to prove a resulting trust, by showing the purchase money paid at the administrator's sale to have belonged to Joseph, William and Samuel McClintock, and that Thomas McClintock, who bid off the land and paid the money, acted as their agent, and did so for them.
>
> A parol agency to buy or sell land is good (*John-*

son v. *Dodge,* 17 Ill. R., 433), and the agent is a competent witness to prove his agency, as between his principal and a third person. *Cadwell* v. *Meek et al.,* 17 Ill. R., 220. And parol evidence is admissible to prove a resulting trust in lands, and is an exception to the general rule requiring written evidence under the statute of frauds and perjuries. Rev. Stats. 1845, p. 259, Sec. 4; Adam's Eq., 165, note 1; *Enos et al.* v. *Hunter,* 4 Gil. R., 218-19; *Boyd* v. *M'Lean,* 1 John. Chan. R., 582.

The declarations or admissions of the nominal purchaser are always admissible to establish the fact of payment by the *cestui que trust,* or the ownership of the money. Adam's Eq. 156, note 1; *Malin* v. *Malin,* 1 Wend. R., 626; *Pierce* v. *McKeehan,* 3 Penn. State R., 136; *Harden* v. *Harden,* 2 Sandf. R., 17; *Lloyd* v. *Carter,* 17 Penn. State R., 216; *Peabody* v. *Tarbell,* 2 Cush. R., 232; *Pinney* v. *Fellows,* 15 Verm. R., 525; *Barron* v. *Barron,* 24 *id.,* 375.

It would seem to result, as a legal conclusion from these several principles, that Thomas McClintock, the supposed nominal purchaser and agent for the alleged *cestui que trust,* was a competent witness, and the plaintiff was entitled to prove the facts proposed and in the mode proposed, unless the title thus made out was insufficient and inadmissible as a foundation for the statute of limitations.

Such was the opinion and ruling of the court below, but we think the title sufficient to defend under the statute. Rev. Stats. 1875, pp. 349-50, Secs. 8, 9, 10 and 11. The court, in *Poage's Heirs* v. *Chinn's Heirs,* 4 Dana R., 54, construed a similar statute of Kentucky of 1809, to embrace an equitable title. And they allowed that title to be proved by such evidence, parol or otherwise, as was proper to establish the several links in the chain. Parol proof was received to establish a descent and heirship, also tenancies and possession under leases. And it was held that the possession and residence of the tenant should inure to the benefit of the landlord, as his pos-

session and residence, in making out a residence for seven years under statute."

We therefore maintain that plaintiff in error, as *cestui que trust* in the trust deed of McCune to Johnson, held such equitable title as is contemplated by Sec. 4, Chap. 83, Rev. Stat. Ill., and that, as the proof of Prettyman's title is admitted, this equitable title of Mrs. Bradley is deducible of record from the United States. The evidence of possession by residence of her tenants and claim of ownership from and after 1880 is undisputed. The payment of taxes is conceded. These facts constitute a perfect bar to defendant in error's action under said statute of 1835 as construed in the following cases:

Irving v. *Brownell*, 11 Ill., 402.
Collins v. *Smith*, 18 Ill., 160.
Dolton v. *Cain*, 81 U. S. (14 Wal.), 472.
Martin v. *Judd*, 81 Ill., 488.
Gregg v. *Tesson*, 66 U. S. (1 Black), 150.
Dredge v. *Forsyth*, 67 U. S. (2 Black), 563.

But the Act of 1872 is herein construed and applied by the Supreme Court of Illinois to have the effect of destroying her complete equitable title and the legal title in her trustee, although fortified by her possession rightfully acquired; or at least to have the effect of changing such title from an absolute one into a conditional one which should be dependent upon her taking out a master's deed, and should *ipso facto* terminate at the expiration of five years if she should fail to take out such deed. And by such statute, the mortgagor's right of redemption is not merely extended beyond the period limited by the law in force when this mortgage was made, but is enlarged into

a perfect title in fee simple, upon the event of such failure on her part to take such deed within the time limited.

It is submitted that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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